(a) Case number, including Social Security Number.
(b) Name, including co-borrower, if any.
(c) Association code (e.g., individual or joint).
(d) Special comments code (e.g., account in dispute).
(e) Street address.
(f) City, State, ZIP code.
(g) Date loan was made.
(h) Type of loan (e.g., real estate).
(i) Loan number.
(j) Total loan amount.
(k) Date of last payment.
(l) Status (e.g., in collection, foreclosure started).
(m) Date loan became delinquent.
(n) Unpaid balance.
(o) Amount past due.
(p) Terms.

§ 1951.219 Reviewing account status.

(a) If a borrower desires an explanation of the account or disagrees with the stated delinquency during the 60-day period between notification and referral, the borrower may request a meeting with the County Supervisor to discuss the account. If a borrower questions the account status, the account will not be referred until it is determined if the status is correct. The County Supervisor will notify the Finance Office to withhold the referral until the borrower's questions are resolved.

(b) After an account has been referred, borrowers may question information reported by contacting the credit bureau or any FmHA office. The office receiving the request for review will contact the Finance Office. The Finance Office will ensure that the request for review is resolved within 15 days.

§ 1951.320 Exception authority.

The Administrator may, in individual cases, make an exception to any requirement or provision of this subpart or address any omission of this subpart which is not inconsistent with the authorizing statute or other applicable law if the Administrator determines that application of the requirement or provision or failure to take action in the case of an ommission would adversely affect the Government's interest. The Administrator will exercise this authority upon the request of the State Director with the recommendation of the Assistant Administrator for Housing; or upon request initiated by the Assistant Administrator for Housing. Requests for exception must be made in writing and supported with documentation to explain the adverse effect, propose alternative courses of action and show how the adverse effect will be eliminated or minimized if the exception is granted.

Dated September 30, 1988.

Vance L. Clark,

Administrator, Farmers Home Administration.

[FR Doc. 88-25174 Filed 10-31-88; 8:45 am]

BILLING CODE 3410-07-M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 20

[Docket No. PRM-20-17]

Rockefeller University; Receipt of Petition for Rulemaking; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; notice of receipt; correction.

SUMMARY: This document corrects the notice of receipt of a petition for rulemaking dated July 22, 1988, which was filed with the Commission by The Rockefeller University (Docket No. PRM-20-17). The notice of receipt for this petition was published October 21, 1988 (53 FR 41342). This notice corrects an inadvertent typographical error which occurred in the preparation of the notice of receipt.

DATES: The comment period for the notice of receipt for PRM-20-17 has been extended to January 3, 1989. Comments received after this date will be considered if it is practical to do so but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Submit written comments to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Acting Chief, Rules Review Section, Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-492-7758 or Toll Free: 800-368-5642.

SUPPLEMENTARY INFORMATION: On page 41343, in the fourth line of the first sentence of the first full paragraph in the second column, "0.001" should be corrected to read "0.01". The corrected sentence reads as follows:

The petitioner requests that the NRC add Sulfur-35, Calcium-45, Chromium-51, Iodine-125, and Iodine-131 in concentrations not exceeding 0.01 microcurie per gram to the list of radioactive isotopes set out in 10 CFR 20.306(b).

Dated at Bethesda, Maryland, this 26th day of October 1988.

For the Nuclear Regulatory Commission.

Donnie H. Grimsley,

Director, Division of Freedom of Information and Publications Services, Office of Administration and Resources Management.

[FR Doc. 88-25224 Filed 10-31-88; 8:45 am]

BILLING CODE 7590-01-M

FEDERAL TRADE COMMISSION

16 CFR Part 13

[File No. 872 3151]

JS&A Group, Inc., et al.; Proposed Consent Agreement With Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, a Northbrook, Ill. company and its president from falsely claiming that any product for personal or household use has been independently investigated or evaluated. It would also prohibit respondents from misrepresenting that a paid advertisement is an independent consumer or news program.

DATE: Comments must be received on or before January 3, 1989.

ADDRESS: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: C. Lee Peeler, FTC/S-4002, Washington, DC 20580. (202) 326-3090.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

List of Subjects in 16 CFR Part 13

Sunglasses, Trade practices.

In the Matter of JS&A Group, Inc., a corporation, and, Joseph Sugarman, individually and as an officer of said corporation.

Agreement Containing Consent Order to Cease and Desist

The Federal Trade Commission having initiated an investigation of certain acts and practices of JS&A Group, Inc., a corporation, and Joseph Sugarman, individually and as an officer of said corporation, hereinafter sometimes referred to as proposed respondents, and it now appearing that proposed respondents are willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated.

It is hereby agreed by and between JS&A Group, Inc., by its duly authorized officers, and Joseph Sugarman, individually and as officer of said corporation, and their attorney, and counsel for the Federal Trade Commission that:

1. Proposed respondent JS&A Group, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at One JS&A Plaza, Northbrook, Illinois 60062.

2. Proposed respondent Joseph Sugarman is President of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, and his address is the same as that of the corporate respondent.

3. Proposed respondents admit all the jurisdictional facts set forth in the draft complaint here attached.

4. Proposed respondents waive:

(a) Any procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

(d) Any claim under the Equal Access To Justice Act.

5. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft complaint contemplated thereby, will be placed on the pubic record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft complaint here attached.

7. The agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent: (1) Issue its complaint corresponding in form and substance with the draft complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding; and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to-order to proposed respondents' address as stated in this agreement shall constitute service. Proposed respondents waive any rights they may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

8. Proposed respondents have read the proposed complaint and order contemplated hereby. They understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order. Proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

Order

I

It is ordered That respondents JS&A Group, Inc., a corporation, its successors and assigns, and its officer, agents, representatives and employees, and Joseph Sugarman, individually and as officer of the said corporation, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any sunglass or any other product for personal or household use, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or indirectly, that such product has been independently investigated or evaluated.

B. Misrepresenting, directly or indirectly, that an advertisement is an independent consumer or news program and not a paid advertisement.

C. For a period of ten (10) years from the date of service of this Order, failing to disclose clearly and prominently in any program length advertisement that the program is an advertisement or commercial. Such fact shall be disclosed at the beginning of the program. In addition, such fact shall be disclosed each time during the program that ordering instructions are given, or at the end of the program if no ordering instructions are given, provided however, that such additional disclosures need not appear more than twice during any half hour period of the program. For purposes of this Order, "program length advertisement" shall mean any video advertisement that ends fifteen minutes or more after it begins.

II

It is further ordered That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this Order.

III

It is further ordered that respondents shall forthwith distribute a copy of this Order to each of their operating divisions.

IV

It is further ordered that respondents shall, within sixty (60) days after service of this Order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted subject to final approval an agreement to a proposed consent order from respondents JS&A Group, Inc. and Joseph Sugarman, its president and owner.

The proposed consent order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the proposed order contained in the agreement.

This matter concerns the promotion of BluBlocker Sunglasses through a print advertisement and "Consumer Challenge", a program length video advertisement.

The Commission's complaint in this matter charges respondents with disseminating advertisements containing false representations that BluBlocker Sunglasses were independently and objectively investigated and endorsed by "Consumer Challenge", an independent consumer program such as "60 Minutes" or "20/20". The complaint also alleges that advertisements for BluBlockers falsely claimed that the producers and investigative reporters of "Consumer Challenge" conducted an independent and objective investigation of BluBlockers without receiving any reimbursement or other financial benefit from respondents.

The complaint alleges that these claims are, in fact, false and that "Consumer Challenge" is not an independent consumer program but rather was created by respondents for the sole purpose of selling BluBlockers. Moreover, the producers and so-called investigative reporters of "Consumer Challenge" were paid directly or indirectly by respondents for producing and acting in the advertisement.

The consent order contains provisions designed to remedy the advertising violations charged as well as to prevent respondents from engaging in similar acts and practices in the future. Part IA of the consent order prohibits respondents from misrepresenting, directly or indirectly, that is product has been independently investigated or evaluated. Part IB prohibits respondents from misrepresenting, directly or indirectly, that an advertisement is an independent consumer or news program and not a paid advertisement.

Part IC of the consent order prohibits respondents from failing to disclose for a period of ten years in all program length advertisement that the program is an advertisement or commercial. Such fact is to be disclosed at the beginning of the program, and in addition, each time during the program that ordering instructions are given, or at the end of the program if no ordering instructions are given. These additional disclosures need not appear more than twice during any half hour period of the program. The final provision of Part IC defines "program length advertisement" for purposes of this order to mean any video advertisement that ends fifteen minutes or more after it begins.

Part II of the consent order requires that respondents notify the Commission at least thirty days prior to any proposed change in the corporate respondents. Part III orders respondents to distribute a copy of the order to each of their operating divisions. Finally, Part IV requires respondents to provide a report to the Commission on its compliance with the provisions of the consent order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Donald S. Clark,

Secretary.

[FR Doc. 88-25194 Filed 10-31-88; 8:45 am]

BILLING CODE 6750-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33-6806; File No. S7-23-88]

Resale of Restricted Securities; Changes To Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: The Securities and Exchange Commission (the "Commission") today is publishing for comment Rule 144A that would provide a safe harbor exemption from the registration requirements of the Securities Act of 1933 (the "Securities Act" or the "Act") for resale of securities to institutional investors.

The Commission additionally is publishing for comment an amendment to Rule 144 under the Act to define the required holding period for restricted securities, whether acquired pursuant to Rule 144A or otherwise, as commencing at the time of sale by the issuer or its affiliate.

DATE: Comments should be received on or before December 31, 1988.

ADDRESS: Coments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comment letters should refer to File No. S7-23-88. All comments received will be available for public inspection and copying in the Commission's Public Reference Room at the same address.

FOR FURTHER INFORMATION CONTACT: Sara Hanks or Samuel Wolff at (202) 272-3246, or (as to changes to Rule 144) Catherine Dixon at (202) 272-2573, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

I. Executive Summary

A. New Rule 144A

The Commission is proposing for comment a new Rule 144A that would provide a non-exclusive safe harbor from the registration requirements of the Securities Act [1] for resales of securities to institutional investors.

The rule provides a safe harbor for three tiers of transactions. The first tier (the "qualified institutional buyer tier") would permit unlimited resales of any securities of any issuer, provided that the purchaser was a specified institution with assets in excess of $100 million or that the seller reasonably believed that the purchaser was such a qualified institution. The second tier (the "non-fungible securities tier") would allow unlimited resales of securities to a wider class of specified institutions, if (i) securities of the class offered or sold were not quoted in an inter-dealer quotation system, listed on a securities exchange in the United States, or issued by an open-end investment company, unit investment trust or face-amount certificate company that is registered under section 8 of the Investment Company Act of 1940 (the "Investment

[1] 15 U.S.C. 77a *et seq.*

Company Act"),[2] and (ii) the securities were non-convertible debt securities, non-convertible preferred stock or securities issued by a company subject to a continuous reporting obligation under the Securities Exchange Act of 1934 (the "Exchange Act").[3] The third tier of proposed Rule 144A would cover resales of non-convertible debt securities, non-convertible preferred stock and securities of reporting companies that are traded in a public market in the United States ("fungible securities") to the same class of institutions as permitted in the second tier.

The qualified institutional buyer and non-fungible securities tiers of the proposed Rule impose no resale restrictions, requiring only that the seller or any person acting on its behalf take reasonable steps to ensure that the buyer is aware that the seller may rely on the exemption from the Securities Act's registration requirements afforded by Rule 144A. In contrast the fungible securities tier requires that the seller or any person acting on its behalf take reasonable steps to prevent the purchaser from reselling the securities in the United States unless they are registered under the Securities Act or an exemption from registration is available. The rule sets forth a non-exclusive method by which that obligation can be satisfied.

The proposed Rule provides a safe harbor exemption from the registration requirements of the Securities Act that would not be exclusive. Attempted reliance on the new safe harbor would not preclude the availability of any other exemption from registration under the Act.

The Commission also is considering adoption of each tier of the Rule independently, or adoption of two tiers without the third. Moreover, the Commission may choose to proceed with one or two tiers of the Rule prior to reaching a final determination as to adoption of the other(s).

B. Amendments to Rules 144 and 145

The Commission also is proposing for comment amendments to rules 144 and 145. Rule 144 permits the public resale of restricted securities when certain conditions, including a minimum holding period, are met. Under the proposed amendments, the time that must elapse before public resale of restricted securities (whether acquired in reliance on Rule 144A or otherwise) would be redefined to commence when the securities are sold by the issuer or its affiliate. Because Rule 145 holding periods are determined by reference to Rule 144, Rule 145 is proposed to be amended to reflect the proposed changes to Rule 144.

The proposed changes to the holding period requirements, which would permit subsequent unaffiliated purchasers to satisfy the requirements through use of the period in which their seller held the securities, would affect trading in all restricted securities, not only those sold under proposed Rule 144A. The proposals thus involve issues that extend beyond the implications for proposed Rule 144A and may be considered by the Commission separately. Accordingly, commentators should address not only the impact of adoption of the two proposals in tandem, but also the potential separate effect of each.

II. The Private Placement Market

A. Market Characteristics

The U.S. private placement market is one of the world's largest securities markets.[4] Its volume of bonds outstanding ranks fifth among the bond markets of the world.[5] About thirty percent of all privately placed bonds outstanding in the world were issued in the U.S. market.[6] At year-end 1987, the aggregate value of outstanding bonds that were issued in the U.S. private market was only slightly less than the aggregate value of outstanding Eurodollar bonds.[7]

While the U.S. private placement market is not new,[8] its importance as a source of funds has increased significantly, especially in the 1980s.[9] The total amount of securities privately placed in the United States increased at an average annual compounded rate of 41% from $18 billion in 1981 [10] to $139 billion in 1987.[11] Table 1 shows new corporate public and private financing for 1970, 1975 and the period 1980–1987.[12]

[2] 15 U.S.C. 80a–8.

[3] 15 U.S.C. 78a *et seq.*

[4] *See* Salomon Brothers Inc, *How Big Is the World Bond Market?—1988 Update* 1 (May 20, 1988); H. Lund, R. Sibert and P Chamberlain (eds.), *Private Placements: National and International Markets* 109 (1984) (hereinafter "Lund").

[5] *See* Salomon Brothers Inc, *supra* n. 4, at 1 (dollar-denominated corporate bonds issued in the U.S. capital market); *cf.* Lund, *supra* n. 4, at 109.

[6] *See* Salomon Brothers Inc, *supra* n. 4, at 1.

[7] *Id.* Data include straight, convertible and floating-rate debt.

[8] *See* E. Shapiro and C. Wolf, *The Role of Private Placements in Corporate Finance* (1972); A. Brimmer, *Life Insurance Companies in the Capital Market* (1962); A. Cohan, *Private Placements and Public Offerings: Market Shares Since 1935* (1961); Mendel, *Institutional Investment Through Private Placement of Corporate Securities*, 53 Col. L. Rev. 804 (1953); Hale, *The Yearbook of Private Placement Financing* (1953); Cross, *Investment Banking and "Private Placements,"* 175 Comm. & Fin. Chron. 1693 (1952); Whipple and Silloway, *Direct Placement of Corporate Loans—A Logical Development*, 175 Comm. & Fin. Chron. 1701 (1952); Conklin, *Direct Placements*, 6 J. of Fin. 85 (June 1951); E. Corey, *Direct Placements of Corporate Securities* 3 (1951); Ketchum, *Direct Placements* 6 J. of Fin. (June 1951); Fraine, *Direct Sale of Security Issues*, 16 J. Am. Ass'n of Univ. Teachers of Ins. 40 (1949); Kuhn, *The Securities Act and Its Effect Upon the Institutional Investor*, 4 L. & Contemp. Prob. 84 (1937).

[9] Maher, *Leveling Off: The Difference Between Public and Private Market Financing Costs Is Slimmer Than Ever*, Investment Dealers' Digest 17 (Oct. 3, 1988); *Private Placement Use To Grow*, Pens. & Inv. Age 18 (Sept. 19, 1988); Zigas, *The Bonds Most Investors Never Hear About*, Bus. Week 152 (Sept. 19, 1988); Parker, *More Issuers Turn to Private Market*, Pens. & Inv. Age 3 (Feb. 8, 1988); Wayne, *A Wall Street Sector Blossoms: The Private Placement*, The New York Times D1 (July 17, 1987); Baker, *Private Offers Up*, Pens. & Inv Age 23 (Apr. 6, 1987); Picker, *Breaking Records: Private Placements Grow in Popularity, Complexity*, Investment Dealers' Digest 30 (Mar. 9, 1987); Monahan, *Private Placements Soar*, Investment Dealers' Digest 8 (Feb. 8, 1983).

[10] Christie, *1981—An Innovative Year in the Private Sector*, Investment Dealers' Digest 20 (Mar. 20, 1982).

[11] Bensman, *Shifting Boundaries: Moving the Line Between the Public and Private Markets*, Investment Dealers' Digest 19 (Mar. 21, 1988). Total private placements amounted to $71 billion in the first half of 1988 compared to $62 billion in the first hafl of 1987. Maher, *supra* n. 9, at 20.

[12] The data in Table 1 and much of the other data cited in this Release are based upon data published in the *Investment Dealers' Digest* and Dealers' Digest, *Directory of Corporate Financing*, or obtained from IDD Information Services, Inc. *See* Dealers' Digest, *Directory of Corporate Financing: Semi Annual Directory* (Spring 1988); *id.* (Spring 1987); Higgins, *The Big Four of Private Placements*, Investment Dealers' Digest 13 (March 1985); Dealers' Digest, *Five Year Directory of Corporate Financing 1980–1984; id., Directory of Corporate Financing: 1970–1980 Decade.* Private placement totals for 1984–1987 are from IDD Information Services, Inc. The *Investment Dealers' Digest* defines "private placement" to include securities that are privately placed through a dealer with non-bank, third-party investors, where the securities have a maturity of at least one year and are non-callable for at least one year. Bensman, *supra* n. 11, at 18. The definition thus would generally exclude privately placed commercial paper. The data do not include securities privately placed directly by the issuer. Bank loans, interest rate and currency swaps and securities that a dealer buys for its own account are not included in the data. Finally, the data exclude school issues, tax-exempt securities, sales of outstanding securities, private placements purchased by foreign investors and bridge loans. *See* Bensman, *supra* n. 11, at 17–18; Bensman, *Equity Kickers* 23–24 (Sept. 14, 1987); Christie, *Private Sector In Slump During 1980*, Investment Dealers' Digest 36 (Mar. 3, 1981).

The annual figures published by the *Investment Dealers' Digest* are not in all cases directly comparable, because the publication made various changes to its classifications in some years. Moreover, the data presented appear to be under-inclusive, in view of the narrowness of the definition of private placement. Nonetheless, they provide an estimate of minimum amounts of securities privately placed annually.

The data presented in this Release have not been verified independently by the Commission or its staff.

TABLE 1.—NEW CORPORATE PUBLIC AND PRIVATE FINANCING

[Millions of dollars]

	Public	Percent public	Private	Percent private	Total new financing
1970	31,130	83	6,373	17	37,503
1975	46,828	78	13,515	22	60,343
1980	57,330	78	15,700	22	73,030
1981	56,085	75	18,400	25	74,485
1982	62,566	72	24,300	28	86,866
1983	97,103	73	35,600	27	133,703
1984	82,199	61	53,258	39	135,457
1985	138,288	65	73,093	35	211,380
1986	6,040	70	123,457	30	409,497
1987	271,477	66	139,355	34	410,832

Since 1980, the primary market in private placements has shown a 37 percent compound average annual growth rate in dollar volume and a corresponding 41 percent growth rate since 1983. In the same periods, the compound average annual growth rate of new financing placed in the public sector was approximately 25 percent and 29 percent, respectively.

The private placement market in the United States is primarily a debt market, although private issuances of equity securities began to increase in the mid-1980s.[13] Private placements by type of security are shown in Table 2 for 1965, 1975 and the period 1980–1987.[14]

[13] *See* Parker, *supra* n. 9, at 34.

[14] Higgins, *supra* n. 12, at 13; Dealers' Digest, *Directory of Corporate Financing: 1970–1980 Decade;* Investment Dealers' Digest and Investment Bankers Association, *1960–1969: A Decade of Corporate and International Finance* 12. Data for 1985–1987 are from IDD Information Services, Inc.

TABLE 2.—AMOUNT OF PRIVATE PLACEMENTS BY TYPE OF SECURITY

[Millions of dollars]

	Debt	Percent debt	Equity	Percent equity	Total
1965	9,562	97	258	3	9,820
1975	12,852	95	663	5	13,515
1980	13,800	88	1,900	12	15,700
1981	16,000	87	2,400	13	18,400
1982	20,700	85	3,600	15	24,300
1983	28,800	81	6,800	19	35,600
1984	43,600	82	9,700	18	53,300
1985	60,565	83	12,528	17	73,093
1986	110,524	90	12,933	10	123,457
1987	122,124	88	17,231	12	139,355

In 1987, debt securities privately placed totaled $122 billion, or 88 percent of total new private placements in the United States.[15] Privately placed debt securities include senior, subordinated and convertible debt issued on an unsecured and secured basis.[16] Traditionally, privately placed debt has been long-term,[17] but a trend toward shorter maturities began in the 1970s.[18] The private placement market presently includes securities with a broad range of maturities,[19] including commercial paper and medium-term notes.[20] In general, debt securities that provide a relatively predictable cash flow are attractive to "liability-matching" investors such as insurance companies.[21]

Equity securities privately placed in 1987 totalled $17 billion, or 12 percent of total new private placements in the United States.[22] Privately placed equity securities include preferred stock,[23] common stock and other equity.

[15] IDD Information Services, Inc. This amount includes, *inter alia*, straight debt, lease-, mortgage-, and acquisition-related debt, private debt with registration rights and certificates of deposit placed through a dealer.

[16] *See* Dash, *The Private Placement Alternative*, in *Private Placements 1988*, at 123 (1988).

Of total debt securities issued privately in 1987, the components were as follows: Bonds, 23 percent; notes, 59 percent; certificates of deposit, 9 percent; lease-related, 7 percent; and other, 2 percent. IDD Information Services, Inc.

[17] Interviews of members of the financial services industry ("Market Participants") by the SEC staff. During 1988, the Commission's staff conducted numerous interviews of members of the financial services industry, including investment banks, commercial banks, insurance companies and pension funds, to discuss the private placement market. *See also* Bensman, *supra* n. 11, at 18 (traditional placement was long-term investment grade debt); Lund, *supra* n. 4, at 109, 111; Corey, *supra* n. 8, at 43.

[18] Market Participants, *supra* n. 17 (most common maturity is 10–12 years); Higgins, *supra* n. 12, at 12 (10 years or less maturity predominates); Picker, *supra* n. 9, at 30; Altman, *Financial Handbook*, 4–23 (1981). "[I]n response to shifting needs of both borrowers and lenders, financings of debt with intermediate maturities (1–10 years) have become more prevalent." *Id.*

[19] *See* Parker, *supra* n. 9, at 34 (1–25 years); Market Participants, *supra* n. 17.

[20] Market Participants, *supra* n. 17. To be included in the Investment Dealers' Digest tabulations of "private placement," *see* Table 1, *supra*, securities must have a maturity of at least one year. *See* Bensman, *supra* n. 11, at 18.

[21] Market Participants, *supra* n. 17.

[22] IDD Information Services, Inc.

[23] In 1987, preferred stock accounted for 26 percent of total equity privately placed. IDD Information Services, Inc. During the period 1980–1984, preferred stock accounted for 32 percent of total equity securities privately placed. Higgins, *supra* n. 12, at 13. In 1977, preferred stocks accounted for 92 percent of total private equity. Christie, *1981-An Innovative Year in the Private Sector*, Investment Dealers' Digest 21 (Mar. 30, 1982).

The market for preferred stock began to grow in the 1970s. Altman, *supra* n. 18, at 422. This growth is reported to be largely attributable to the increased use of preferred stocks in corporate mergers, and to the increased participation of utility companies in the private placement market. *Id.* The development of an intermediate preferred market in the 1970s also contributed to the expansion of the private preferred market. *Id.*, at 4–23. Today, the preferred market includes a wide range of securities. *E.g.*, Bensman, *supra* n. 11, at 17 (private placement in the United States of Dutch auction preferred stock by foreign issuer).

In 1987, common stock accounted for only 16 percent of total equity privately issued.[24] Excluding equity portions of lease financings, mortgage- and acquisition-related financings and private transactions with registration rights, the amount of equity sold privately in 1987 totalled approximately $12 billion.[25]

In 1987 almost $16 billion in private financing (including debt and equity securities) was acquisition-related.[26] Private placements of securitized assets grew in 1987 to $23 billion, reflecting increases in the overall mortgage and asset-backed market.[27] Lease-related private placements also continued to grow in 1987, reaching about $15 billion by year end.[28]

B. Issuers

A Diverse group of issuers supplies securities to the private market.[29] The core segment of the market traditionally has been the "lower investment-quality issues":

> The core market comprises mainly the large but not giant corporations, those with a bond rating of A or Baa from Moody's, or an A or BBB from Standard & Poor's. * * * Long-term loans to these borrowers are perceived as somewhat risky (at least compared to government obligations) but overall not likely to default. * * * They constitute the lower end of the investment grade securities, which institutions consider prudent fiduciary investments.[30]

Less significant segments of the private placement market are the two ends of the spectrum in terms of risk.[31] At one end are high quality, highly rated issuers whose securities are preferred by conservative investors, such as public retirement funds.[32] Higher quality issuers are more apt than lower quality issuers to use the public markets for financing, given the accessibility of the public market and the ease of registration.[33] At the other end of the spectrum are highly leveraged and other higher risk issuers whose securities frequently are purchased by asset-based lenders (such as commercial finance companies) and venture capitalists, as well as by insurance companies.[34] Private placement of "high yield" debt has increased substantially in the last four years.[35]

By industry type, industrial companies are the largest issuers in the private market, followed by finance companies and utilities,[36] as shown in Table 3.[37]

TABLE 3—PRIVATE PLACEMENTS BY TYPE OF ISSUER

[Millions of dollars

	Utilities	Industrials	Finance companies	Foreign	Total
1960	2,398	10,062	1,205	719	15,700
1981	3,948	10,060	1,208	1,803	18,400
1982	2,420	13,218	2,162	1,432	24,300
1983	2,798	18,813	8,338	2,851	35,600
1984	4,807	22,600	21,300	3,300	53,300
1985	4,000	36,900	26,200	2,500	73,093
1986	6,400	58,200	53,200	10,700	123,457
1987	8,800	64,800	62,000	6,700	139,355

[24] IDD Information Services, Inc. "Other equity," which includes equity portions of lease financings and limited partnership interests, *see* Monahan, *Private Placements Soar,* Investment Dealers' Digest 9 (Feb. 8, 1983), accounted for 58 percent of private equity in 1987. IDD Information Services, Inc. *See also* Lund, supra, n. 4, at 110 (private equity is largely just participation in various kinds of tax-oriented investments, such as equipment financing and oil-and-gas partnerships); Bensman, *supra* n. 11, at 22 (large amount of limited partnership interests in leveraged buyout funds).

[25] Bensman, *supra* n. 11, at 20.

[26] *Id. See LBOs Forced to Abandon Public Market for Private Investors,* 13 Corp. Fin. Week 2 (Dec. 28, 1987).

[27] Bensman, *supra* n. 11, at 20, 21. Securitized transactions include mortgage-related placements, receivables-backed securities (*e.g.,* securitized car loans, and other asset-backed securities. *Id.* Mortgage-related private placements amounted to $13 billion in 1986. See Picker, *supra* n. 9, at 34 (total includes only mortgage-related placements, and excludes receivables-backed and other asset-backed securities.) *See generally* Cumming, *The Economics of Securitization,* 12 Fed. Res. Bank of N.Y. Q. Rev. 11 (Fall 1987). *See also Holiday Uses Unique Collateral In Private Deal,* 14 Corp. Fin. week (Feb. 29, 1988) (franchise royalties); Givant, *World Taking Asset-Backed Idea to Heart,* 16 Pens. & Inv. Age 37 (May 2, 1988); *Mortgage Loans,* 153 Am. Banker (Mar. 29, 1988); Albert, *Auto Leases Used to Back 4-Year Notes,* Am. Banker (Oct. 13, 1987). Fraust, *Loan-Sales Gurus Project Big Growth,* Am. Banker 7 (Aug. 22, 1988); Neustadt, *Insurer Buys $400 Million of Card-Backed Notes,* Am. Banker 2 (June 22, 1988); *Major Mortgage-Backed Securities Offerings,* Am. Banker 12 (May 20, 1988).

[28] Bensman *supra* n. 11, at 21. The significant increase from the 1986 total of $11.5 billion represents, in part, an increase in aircraft lease finance. *Id. See also* Lund, *supra* n. 4, at 114 (equipment financing also includes railroad stock, freighters, tankers and pipelines). *See* generally Kadlec, *The Lease Finance Business is Exploding,* Investment Dealers' Digest 18 (Mar. 10, 1986).

[29] Lund, *supra* n. 4. at 111.

[30] *Id. See also* Gage, *Private Placement: A New Option for the Middle Market,* 8 Cash Flow 49 (Feb. 1987); *Private Window Opens for Baa Issuers,* 13 Corp. Fin. Week 1 (Jan. 26, 1987); *Equitable Nixes Private High Grade Corporates,* 13 Corp. Fin. week 1 (Feb. 2, 1987); *Raising More Cash in Private Placements,* Business Week 96 (Oct. 27, 1975) (lower-grade companies that cannot borrow in the public market are using private market).

[31] Lund, *supra* n. 4, at 112.

[32] *Id.*

[33] Market Participants, *supra* n. 17.

[34] Lund, *supra* n. 4, at 113. *See also Raising More Cash in Private Placements,* Business Week 96 (Oct. 27, 1975).

[35] Market Participants, *supra* n. 17; *see* Bensman, *supra* n. 11, at 17; Picker, *supra,* n. 9, at 30.

[36] *See generally* Shapiro and Wolf, *supra* n. 8, at 30–35 (substantial reliance by utilities on public market); Wolf, *Demand for Funds in the Public and Private Corporate Bond Market,* 65 Rev. of Econ. and Statistics 27 (Feb. 1974) (same). *See also Gas Company Debt Issues,* 112 Pub. Util. Fortn. 44 (Dec. 22, 1983) (during period 1981–1983, 33 percent of debt financing by natural gas industry was placed privately). *Mississippi P&L Turns to Private Market for Junk Bonds,* 13 Corp. Fin. Week 8 (Dec. 28, 1987).

A large amount of real estate securities is also sold privately. Wolf, *supra* at 26. Shapiro, *supra* n. 19, at 41–43, 142.

[37] *A Good Year for Private Placements,* Investment Dealers' Digest 8 (Mar. 13, 1984). Data for 1984–1987 are from IDD Information Services, Inc. The issuers shown do not represent all categories of issuers. The sum of the amounts presented in the four categories does not equal the totals, because not all categories of issuers are shown; also, amounts shown under "foreign issuers" also may be counted in other categories (*e.g.,* industrials). In addition to the categories shown, the totals include government securities and "other" securities. "Industrials" include, *inter alia,* transportation securities and service companies.

Historically, private placements in the United States by foreign issuers have been relatively limited. Recently, however, foreign governments [38] as well as foreign private companies [39] have privately placed substantial amounts of securities in the United States, although such placements still only account for a small percentage of the private market. In 1987, foreign issuers (including Canadian issuers) privately placed securities aggregating $6.7 billion in the United States.[40] These transactions have frequently taken the form of a U.S. private placement made contemporaneously with an offshore offering.[41] The participation of foreign issuers in the U.S. private placement market may be limited by state laws or internal regulations that restrict the percentage of assets that insurance companies and pension funds may invest in foreign securities.[42]

Domestic issuers of equity in private placements are usually non-reporting companies.[43] Secondary market liquidity for reporting companies provides a strong incentive to issue freely resalable securities.[44] At the same time, the existence of secondary market liquidity for these issuers creates concern that fungible privately placed equity securities will be resold into the retail market. On the other hand, a large amount of debt is sold in private placements by reporting companies, in situations where there is no pre-existing public market providing easy resale.[45]

Issuers reportedly participate in the private market to preserve confidentiality; to avoid the rating process; to issue securities with complicated or unusual terms; to reduce costs of issuance; to avoid delays associated with registration; and to delay take-down of funds.[46]

C. Investors

Investors in the private placement market are almost exclusive institutions.[47] Insurance companies became [48] and remain [49] the dominant investors in this market, consistently supplying substantial funds to the U.S. private market since its inception.[50] Acquisitions of privately placed securities by insurance companies account for the vast majority of total private offerings.[51]

Various other institutions participate as investors in the private market, but the extent of their participation is small relative to that of insurance companies. Private pension funds, state and local retirement funds, state and local governments, domestic bank trust departments, bank holding companies, and similar institutions purchase privately placed securities,[52] although their collective purchases in the 1980s have been estimated to account for only about 10 to 20 percent of total private placements.[53]

Venture capitalists invest in the private market [54] and tend to purchase securities of start-up companies, highly leveraged companies or other higher risk enterprises.[55] Foreign institutions, particularly Japanese investors, have participated in the U.S. private placement market in recent years in a wide variety of transactions, including complex placements such as leveraged leases and leveraged buy-outs.[56]

Generally, the reasons given for investors' participation in the U.S. private market are yield incentives, asset/liability matching, the ability to take large participations, better call protection, and better covenant protection.[57]

D. Intermediaries

Intermediaries are used in the private placement market as in other U.S. financial markets. However, the system

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[38] *E.g., Belgium to Tap Private Placement Market,* 14 Corp. Fin. Week 1 (May 9, 1988).

[39] *Wave of Foreign Debt to Hit U.S. Private Placement Market,* 13 Corp. Fin. Week 1 (Dec. 14, 1987). Several private placement professionals have pointed to "a continuing trend among foreign issuers to use the U.S. private market because it offers competitive rates, and all-in financing costs may be lower than U.S. public and Eurobond market rates." *See Belgium to Tap Private Placement Market, supra* n. 38, at 1. *See also* Lund, *supra* n. 4, at 114; Bensman, *supra* n. 11, at 17 (U.S. private market desirable for European companies with dollar exposures to get long-term, fixed-rate financing).

[40] IDD Information Services, Inc. The same year, foreign issuers registered with the Commission securities aggregating $12 billion.

[41] Lund, *supra* n. 4, at 42. *E.g., CGE Plans U.S. Placement at Time of Offer in France,* Wall St. J. 31 (Apr. 28, 1987) (CIE Generale D'Electricite).

[42] *See* Lund, *supra* n. 4, at 114. *E.g.,* N.Y. Insurance Law § 1405(a)(7) (McKinney 1985); *Wave of Foreign Debt to Hit U.S. Private Market,* 13 Corp. Fin. Week 1, 12 (Dec. 14, 1987).

[43] Market Participants, *supra* n. 17. Public companies reportedly tend to issue equity securities only in special circumstances, such as a debt transaction with an equity component (*e.g.,* debt with warrants); a takeover defense; a leveraged buy-out; a joint venture; or a restructuring. *Id.* Occasionally, small public companies issue equity privately, but ordinarily only to satisfy a relatively small need for funds.

[44] Restricted securities typically sell at a discount to securities that are freely tradeable in the public market. Market participants, *supra* n. 17. *See* Bolten, *Discounts for the Stocks of Closely Held Corporations,* Trusts & Estates 22 (Dec. 1984); Gelman, *An Economist-Financial Analyst's Approach to Valuing Stock of a Closely-Held Company,* J. of Taxation 353 (June 1972); Feld, *The Implications of Minority Interest and Stock Restrictions in Valuing Closely-Held Shares.* Univ. of Pa. L. Rev. 934 (1974).

[45] Market Participants, *supra,* n. 17.

[46] Dash, *supra* n. 16 at 24; Lund, *Supra* n. 4, at 111; W. Cowie, *Direct Placements with Insurance Companies,* in 6 N.Y. State Ins. Dept. Examination of Ins. Companies (1955); Wolf, *supra* n. 36, at 27, 28. *See also,* Bensman, *supra* n. 11, at 19 (private market used for complex transactions); *Small Lenders Heat Up Competition in Private Placement Market,* 14 Corp. Fin. Week 1 (Aprl 11, 1988) (delayed delivery feature permits issuers to lock-in rate for securities to be issued in the future).

[47] Market Participants, *supra* n. 17. Indeed, an important catalyst to the development of the private placement market in the United States was the tremendous growth in institutional savings, especially in the form of life insurance reserves. E. Shapiro and Wolf, *supra* n. 8.

[48] Shapiro and Wolf, *supra* n. 8, at 50. "Life insurance companies have been the most active and consistent participants in the private market during the post-war period." *Id.* at 49 (1972). One reason for the dominance of insurance companies as investors in the private market has been the growth in life insurance assets coupled with difficulties in finding qualified outlets for life insurance funds. Corey, *supra* n. 8, at 19. "Competing as they do with other investors for the available supply of investments, life companies as a group face an investment problem created by their own size." *Id.* (1951).

[49] Wayne, *supra* n. 9, at D2; Baker, *Private Offers Up,* Pens. & Inv. Age 23 (Apr. 6, 1987); Higgins, *supra* n. 12, at 13; *Insurance Companies Feed Private Placement Market,* 11 Pens. & Inv. Age 33 (July 11, 1983).

[50] *See* Lund, *supra* n. 4, at 110.

[51] Market Participants, *supra* n. 17; Cabanilla, *Directly Placed Bonds: A Test of Market Efficiency,* 10 J. of Portfolio Management 72 (Winter 1984).

[52] Market Participants, *supra* n. 17; Lund, *supra* n. 4, at 109.

[53] Market Participants, *supra* n. 17. Traditionally, pension funds have tended to prefer securities of higher quality issuers than have insurance companies. *Id.*

[54] Lund, *supra* n. 4, at 113. Benton and Gunderson, *Venture Capital Financings and Exemptions from Registration Under the Securities Act of 1933: Section 4(2), Rule 146 and Rule 242,* 21 Santa Clara L. Rev. 23 (Winter 1981). *Cf.* Torpey and Viscione, *Mezzanine Money for Smaller Businesses,* 3 Harv. B. Rev. 116 (May-June 1987).

[55] Lund, *supra* n. 4, at 113.

[56] Parker, *supra* n. 9, at 3 (Japanese institutions); Wayne, *A Wall Street Sector Blossoms: The Private Placements,* The New York Times D2 (July 17, 1987) (Japanese investors); Keslar, *Joining in a Private Fight: Commercial Banks Are Doing Private Placements,* Euromoney 175 (Dec. 1986) (Japanese institutions and European banks); Greene, *Every Risk Has Its Price,* Forbes 156 (Nov. 16, 1987); Gage, *Wide Range of Factors Favor Overseas Financing,* 8 Cash Flow 53 (Sept. 1987) (discussing private placements by U.S. corporations to foreign investors offshore); *Fed Approves Sale of Major Stake in CB Bancshares to Japanese,* Am. Bank. 2 (May 12, 1987) (private placement to Japanese finance company); Blanton, *Japanese Companies Help Jet Financing Get Off Ground,* Pens. & Inv. Age 47 (Oct. 1, 1984); Albert, *Banks Sell Notes Backed by Associated Grocers' Assets,* Am. Bank. 30 (Feb. 16, 1988) (foreign banks major purchasers in asset-backed securities transaction); Bensman, *supra* n. 11, at 22 (Japanese investment in privately placed interests in leveraged buyout funds); Parker, supra n. 9, at 34 (participation of Japanese investors in leveraged buyouts); Parker, *supra* n. 9, at 30, 35; Hemmerick, *Japanese Vie for U.S. Debt Market,* Pens. & Inv. Age 6 (Nov. 30, 1987).

[57] Dash, *supra* n. 16, at 128; *see also LBOs Forced to Abandon Public Market for Private Investors,* 13 Corp. Fin. Week (Dec. 28, 1987); Parker, *supra* n. 9, at 34.

for placing new issues in the private market is less standardized than that in the public market.[58] While in some cases the issuer and investor deal directly with each other, the major portion of new issues in the private market is placed by intermediaries.[59] The average size of private issues sold by intermediaries tends to be larger than private placements sold directly.[60]

Historically, investment banks have played the major role as intermediaries in the private market; [61] however, in the 1980s, commercial banks have become more active.[62]

Of the 20 private placement agents placing the largest amount of securities in 1987, 12 investment banks placed $96 billion of securities and eight commercial banks placed $34 billion.[63] Traditionally, commercial banks have been most active in placing straight debt securities,[64] but banks are reported to be increasingly active in privately placing asset-backed securities and certificates of deposit.[65] The parameters of commercial banks' participation as intermediaries are set by the Glass-Steagall Act.[66]

III. The Secondary Market for Private Placements

A secondary market for privately placed securities has become an established feature of American corporate finance.[67] In 1979, a Bar committee reported that "an active and substantial [68] secondary market for the resale of privately placed debt securities exists and functions alongside the secondary markets for the resale of other securities." [69] Estimates of total volume of secondary trading in private placements in the 1980s have ranged from $1.5 to $6 billion annually.[70]

In contrast to the primary market for private placements, which includes a significant equity component, the secondary market for private placements reportedly consists almost entirely of debt securities.[71] The majority of these securities have not been rated by a nationally recognized statistical rating organization,[72] although in many cases other debt securities of the issuer are rated, often investment grade.[73] Straight debt securities are resold in the secondary market more frequently than debt securities with complex terms and covenants.[74] Larger original issues are resold more frequently than smaller issues.[75] The secondary market for privately placed commercial paper reportedly is small, due to the short-term nature of the instruments.[76]

Most issuers of securities resold in the secondary private placement market are domestic issuers.[77] Domestic issuers of debt securities resold in the secondary private market are, more often than not, reporting companies.[78] However, the limited equity securities resold in the secondary market usually are issued by non-reporting companies.[79] Buying and selling in the secondary market mirror the activity in the primary market. Buyers and sellers are almost always institutions,[80] and are predominantly insurance companies.[81]

Volume is often higher at year-end,[82] reflecting the tax considerations that

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[58] *See* Cabanilla, *supra* n. 51, at 72.

[59] Market Participants, *supra* n. 17; Shapiro and Wolf, *supra* n. 8, at 79.

[60] Market Participants, *supra* n. 17.

[61] Rudin, *Investment Banks Retain Dominance*, Pens. & Inv. Age 17 (October 5, 1987).

[62] Neustadt, *Banks Take Big Share of Private Financing Market*, 153 Am. Bank. 21 (March 21, 1988); Neustadt, *Banks Encroach on Wall Street's Turf*, 153 Am. Bank. 1 (April 4, 1988); Keslar, *Joining in the Private Fight: Commercial Banks Entering the Private Placement Market*, Euromoney 175 (Dec. 19, 1986); Albert, *Banks Forge Ahead with Private Placements*, 151 Am. Bank. 1 (July 17, 1988); Parker, *Commercial Banks Take Aim*, 16 Pens. & Inv. Age 35 (Feb. 22, 1988); *cf. A.G. Becker, Inc. v. Board of Governors of Fed. Res. Sys.*, 519 F. Supp. 602, 604 (D.D.C. 1981), *rev'd*, 693 F.2d 136 (D.C. Cir 1982), *rev'd sub nom., Securities Industry Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 137 (1984) (discussing placement activities of banks in commercial paper markets). *See also Long-Term Credit Bank of Japan Looks to Become Private Placement Agent*, 13 Corp. Fin. Week (Mar. 23, 1987).

Until Board of Governors of the Federal Reserve System, *Statement Regarding Determination Not to Initiate Enforcement Action* (Sept. 26, 1980) (Bankers Trust), it was generally assumed that the Glass-Steagall Act barred banks (and bank holding companies) from acting as intermediaries in private placements. *See also* Staff of the Board of Governors of the Federal Reserve System, *Commercial Bank Private Placement Activities* 86-87 (1977).

[63] Bensman, *supra* n. 11, at 19. Three commercial banks were included in the top ten placement agents for 1987. *Id.* According to the *Investment Dealers' Digest*, the top ten placement agents in 1987, and the amounts of securities placed (in billions) were Salomon Brothers Inc, $14.9; The First Boston Corp., $11.5; Drexel Burnham Lambert Incorporated, $11.4; Goldman, Sachs & Co., $11.3; Shearson Lehman Hutton Inc., $10.1; Merrill Lynch, Pierce, Fenner & Smith, Inc., $9.3; Bankers Trust Company, $9.0; Morgan Stanley & Co., Incorporated, $7.2; Paine Webber Incorporated, $7.2; and Morgan Guaranty Trust Company of New York, $6.8. *See* Bensman, *supra* n. 11, at 19.

[64] Picker, *supra* n. 9, at 33.

[65] Neustadt, *Banks Take Big Share of Private Financing Market*, Am. Banker 10 (Mar. 21, 1988) (commercial banks strongest in asset-backed securities, private certificates of deposit and straight debt, and weakest in acquisition-related transactions). *See also* Albert, *Banks Sell Notes Backed by Associated Grocers' Assets*, Am. Banker 30 (Feb. 10, 1988).

[66] The United States Court of Appeals for the District of Columbia Circuit ruled, in a case involving a bank's placements of commercial paper, that the Glass-Steagall Act's prohibition of underwriting by banks does not prevent agency private placements. *Securities Industry Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 807 F.2d 1052 (1986), *cert. denied*, 107 S. Ct. 3228 (D.C. Cir. 1987). *See also* Comptroller Staff No-Objection Letter No. 87-4 (May 19, 1987); Comptroller Staff No-Objection Letter No. 87-3 (March 24, 1987); S. 1886; 100th Cong., 2d Sess., 134 Cong. Rec. S3360-79 (1988); H.R. 5094, 100th Cong., 2d Sess., H.R. Rep. No. 100-822, Part 1, 1-99. *Cf.* H.R. Rep. No. 100-822, Part 2, 100th Cong., 2d Sess, (1988) (version of H.R. 5094 favorably reported by Committee on Energy and Commerce).

[67] *See* Monahan, *Trading in Private Placements: Secondary Market Liquidity and Volume are Increasing*, Investment Dealers' Digest 5 (Apr. 26, 1983). As indicated below, the secondary market for privately placed debt securities is well established, while the secondary market for private equity is relatively small.

Published data regarding the secondary market for privately placed securities is almost completely unavailable. Much of the following discussion is based, therefore, on information compiled by the Commission's staff in a series of interviews with market participants. *See supra* n. 17.

[68] Footnote in original omitted.

[69] Committee on Developments in Business Financing of the Section of Corporation, Banking and Business Law of the American Bar Association, *Resale by Institutional Investors of Debt Securities Acquired in Private Placements*, 34 Bus. L. 1927, 1931 (July 1979) (hereinafter "Committee"). "The secondary market for privately placed debt securities provides to institutional investors, and to dealers in such securities, a market place for the offering and resale of substantial amounts of such securities on the basis of quality and yield." *Id.* at 1937.

Volume in the secondary market appears to have increased significantly in the mid-late 1970s. *See generally* Monahan, *supra* n. 67; *Raising More Cash in Private Placements*, Business Week 96 (Oct. 27, 1975) (forty-four percent of 200 institutions surveyed indicated they had bought or sold privately placed securities in the past year). In earlier periods, the secondary market for privately placed securities was not considered a liquid market. E. Altman, *supra* n. 18, at 4-22; Lund, *supra* n. 4, at 122; Shapiro and Wolf, *supra* n. 8, at 104; Corey, *supra* n. 8, at 97. The resale market became more liquid in the mid-late 1970s, through no systemic changes occurred in the private market during this period. *See* Committee, *supra* at 1931; Monahan, *supra* n. 67 at 5.

[70] *See, e.g.*, Monahan, *supra* n. 67 at 6; Market Participants, *supra* n. 17.

[71] Market Participants, *supra* n. 17. Privately placed preferred stock is resold less frequently than debt but more frequently than common equity. *Id.*

[72] *Id.* Currently, the nationally recognized statistical rating organizations include Moody's Investor Services; Standard & Poor's Corporation; Duff & Phelps, Inc.; Fitch Investor Services, Inc.; and McCarthy, Crisanti & Maffei, Inc.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] Committee, *supra*, n. 69, at 1931-32; Market Participants, *supra* n. 17.

[81] Market Participants, *supra* n. 17.

[82] *Id.*

may prompt an institution to sell a portion of its private portfolio at that time.[83] Portfolio and asset management, including matching assets and liabilities, responding to interest rate fluctuations and reacting to deteriorations in credit quality, also motivates institutions to sell in the secondary market.[84] Resales in the secondary market reportedly range from $500,000 to $20 million per transaction.[85]

Decisions to buy privately placed debt securities in the secondary market are reported to be "influenced particularly by the differences between the yields in the secondary market for such securities and for other debt securities, as well as by the relatively more advantageous redemption and sinking fund provisions of many privately placed securities." [86]

Intermediaries, such as investment and commercial banks, are almost always involved in resales of privately placed securities, although direct resales occasionally do occur.[87] While the intermediary sometimes acts on an agency basis, it usually operates on a principal basis. Resales generally are intermediated by the original placing agent.[88]

IV. Institutional Sales Under the Federal Securities Laws

The Congress and the Commission historically have recognized the ability of professional institutional investors to make investment decisions without the protections mandated by the registration requirement of the Securities Act. The Commission has not until now, however, formally addressed the difference between the institutional and public resale markets. The institutional resale market for restricted securities has evolved to a point where its existence should be acknowledged.

Proposed Rule 144A could have a significant impact on both the primary and secondary domestic markets for unregistered securities of reporting as well as nonreporting issuers.[89] Removing uncertainties as to the legitimacy of resales to institutional buyers by providing a safe harbor from registration could permit some transactions to take place that otherwise might not occur. Such transactions might include resales by persons that purchased securities privately with a view to their immediate resale to a number of institutions. Providing a framework in which institutional resales could be made freely may increase the efficiency of the private placement market. Liquidity in the market may increase,[90] not only as the result of increased efficiency, but also as a consequence of the resale provisions of proposed Regulation S.[91] The potential increase in efficiency and liquidity could significantly lower the discount commonly associated with private placements,[92] which in turn may attract an increasing number of issuers to the private placement market.[93]

The Rule may have significant implications for offerings by foreign issuers. Foreign issuers who previously may have foregone raising capital in the United States due to the compliance costs and liability exposure associated with registered public offerings, and the costs of financing inherent in placing restricted securities, may find private placements in the United States a more viable capital-raising option as a result of the combined effect of proposed Rule 144A and proposed Regulation S. Greater participation by foreign issuers in the U.S. capital market also would have the benefit of reducing the costs borne by U.S. institutional investors that wish to invest in foreign securities and are compelled at present to go overseas to obtain such securities. Moreover, U.S. intermediaries who may have lost business to foreign competitors simply because such securities may be available only offshore may be afforded more opportunities to participate in the internationalization of investment strategies.

While the Commission recognizes that a substantial institutional resale market currently exists, it anticipates that the development under Rule 144A of more formal, active trading markets will raise questions as to the effect of institutional markets on the efficiency and liquidity of the public trading markets. Those consequences need to be understood in considering adoption of Rule 144A, and, if the Commission determines to proceed, in determining whether to adopt the three tiers of the proposed Rule as a package, separately at different points in time, or in some combination.

The Commission anticipates that resales made in reliance on Rule 144A, whether executed on proposed closed systems such as PORTAL or SITUS [94] or elsewhere, would be used principally for transactions involving debt securities, preferred stock or common equity securities of a class not already publicly traded in the United States. While the qualified institutional buyer and fungible securities tiers of the Rule would be available for transactions in securities that are fungible with securities publicly traded in the United States, the Commission does not expect that Rule 144A would give rise to any significant volume of private transactions in classes of publicly traded securities. That is not currently the case,[95] and, notwithstanding the potential for increased efficiency in the private resale market and the ability to avoid costs and delays associated with registration, it may not be financially advantageous in the future for companies to sell securities in a market that was comparatively limited in its depth and liquidity.

Nonetheless, the Commission requests comment on the likelihood that an active, liquid private market will develop alongside a public market for the same class of securities in the United States. If such a development is viewed as likely, comment is requested on the nature of such markets, the consequences to the liquidity and efficiency of the public market for such securities, and whether any steps should be taken to prevent such a development. For example, should reliance on Rule 144A be precluded with respect to any class of securities that is registered

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[83] *Id.*

[84] *Id.*; *see also* Committee, *supra* n. 69, at 1933 (increase liquidity, create or use capital gains or losses, diversify portfolios).

[85] Market Participants, *supra* n. 17.

It has been reported that, in the secondary market for privately placed debt, "the credit quality of the debt securities being sold, their yield to maturity and the extent to which such yield is or may be affected by redemption provisions, are much more important factors in establishing resale prices than is the identity of the particular issuer or transient economic factors affecting the current market prices of its common stock." Committee, *supra* n. 69 at 1932, *citing* Exchange Act Release No. 15220 (Oct. 16, 1978) [43 FR 47538]. Credit quality and yield appear still to be critical elements in the pricing of debt securities, at least with respect to investment grade debt.

[86] Committee, *supra* n. 69, at 1933.

[87] Market participants, *supra* n. 17. *See also* Kleinfield, *Prudential to Sell Pieces of Its Private Placements*, The New York Times D3 (Aug. 11, 1988).

[88] *Id.*

[89] Issuers in the "non-reporting" category would include start-up companies and foreign issuers.

[90] The perception among investors of illiquidity in the private placement market has been cited as a reason why some investors avoid the market. Market Participants, *supra* n. 17.

[91] Proposed Regulation S (17 CFR 230.901–230.906), Securities Act Release No. 6779 (June 10, 1988) (53 FR 22661). The resale safe harbor of Rule 906 of proposed Regulation S, which allows persons other than issuers or underwriters to sell specified unregistered securities on foreign securities exchanges without imposing resale restrictions, should provide significantly more liquidity for restricted securities of foreign issuers.

[92] *See supra* n. 44.

[93] Market Participants, *supra* n. 17. For example, U.S. issuers who now raise capital through the international capital market might instead elect to offer their securities through private placements in the United States.

[94] *See infra* n. 191.

[95] *See supra* n. 43.

under the Securities Act or the Exchange Act? Comment also is requested on the likelihood that arbitrage would occur between the public and private markets for common stock, if dual markets were to develop; whether such arbitrage would be beneficial or harmful to the U.S. markets; if harmful, how it might be discouraged, and if beneficial, how it might be encouraged? Commenters should indicate whether their responses to the above questions would differ depending on whether the qualified institutional buyer tier of proposed Rule 144A, the fungible securities tier, or both were adopted.

The Commission also requests comment as to whether the risks of market manipulation and insider trading will increase significantly enough with the evolution of a more active institutional market that the Commission should permit such a market to develop only in a more formalized structure subject to surveillance, Commission oversight, and transaction reporting requirements.

The Commission also anticipates that proposed Rule 144A will facilitate, and thereby encourage, dealers' purchases of securities, particularly foreign securities, either in primary offerings or secondary transactions, with a view to resale in the United States. The Commission requests comment on the appropriateness, and the potential consequences, of the use of the Rule to exempt from registration such resales to institutions purchasers.

The Commission also recognizes that, by increasing the efficiency of the resale market for "restricted securities," issuers, particularly foreign issuers, that eventually might have chosen to register their securities for public sale in the United States, may forego registration and still have the benefits of access to the U.S. markets. Market participants have suggested that foreign issuers choosing to sell securities publicly in the United States do so for reasons not directly related to capital-raising needs, such as obtaining name recognition in the U.S. capital markets. The Commission requests comment on the likelihood that adoption of any of the three tiers of proposed Rule 144A, or some combination of the three tiers, might diminish the number of foreign issuers that eventually would choose to make a public offering in the United States. Similarly, how would the adoption of any or all of the three tiers affect the process by which domestic issuers typically first access the private market and then graduate to registered public offerings?

To the extent that an active institutional trading market continues to evolve, the trading market interest, both institutional and retail, in the securities of the issuer is likely to increase. In such case, the potential for "leakage" into the retail market would be greater, particularly in the case of common equity securities. Under section 12(g) of the Exchange Act, the public markets would be protected in the case of domestic issuers because reporting obligations generally will be incurred when any class of equity securities is held by 500 or more persons.[96] In the case of foreign securities, however, under current rules, there would be no such protection because Rule 12g3-2(b) [97] would permit the securities to be held by any number of shareholders so long as the securities were not quoted in NASDAQ or listed on U.S. securities exchanges. Rule 144A can thus be expected to create the potential for greater trading in foreign securities in the United States. In addition, the proposed changes to rule 144, which will in many cases telescope the required holding period for securities, could further accelerate this development. In light of this potential, the Commission requests comment on the appropriateness of continuing the exemption provided by Rule 12g3-2(b) for issuers whose securities are widely held by non-institutional investors, if proposed Rule 144A (particularly the qualified institutional buyer tier), the proposed change to Rule 144 or both were adopted.

A. Historical Treatment of Institutions

1. Legislative History

The Securities Act was remedial legislation designed "to protect the investing public and honest business." [98] The "investing public" intended to benefit from the registration provisions of the Securities Act was unsophisticated, individual investors.[99] Despite measurable institutional presence in the capital markets,[100] Congress concentrated on the protection of individuals.[101]

James Landis, a principal draftsman of the Securities Act and the second Chairman of the Commission, recalled that the draftsmen believed that "[t]he sale of an issue of securities to insurance companies or to a limited group of experienced investors, was certainly not a matter of concern to the Federal government." [102] Writing at the same time as Landis, the Commission itself stated that the 1933 Congress imposed upon the industry "standards of conduct * * * basic to any proper relationship to *public* investors." [103]

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[96] 15 U.S.C. 78*l*(g). Section 12(g) requires issuers to file reports under the Exchange Act if they have assets of over $1 million or a class of equity securities held of record by 500 or more persons. Rules 12g-l under the Exchange Act (17 CFR 240.12g-l) exempts issuers from this obligation if they have total assets not exceeding $5 million.

[97] 17 CFR 240.12g3-2(b).

[98] S. Rep. No. 47, 73rd Cong., 1st Sess. 1 (1933) (hereinafter "Senate Report"):

The aim [of the legislation] is * * * to protect honest enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities offered to the public through crooked promotion; * * * to bring into productive channels of industry and development capital which has grown timid to the point of hoarding; and to aid in providing employment and restoring buying and consuming power.

See generally J. Seligman, *The Transformation of Wall Street* 1-72 (1982).

[99] *See infra* nn. 101, 102.

[100] *See Proposed Amendments to the Securities Act of 1933 and to the Securities Exchange Act of 1934: Hearings on H.R. 4344, H.R. 5065, and H.R. 5832 Before the House Comm. on Interstate and Foreign Commerce*, 77th Cong., 1st Sess. pt. II, 586 (1941) (statement of Commissioner Purcell):

There seems to be practically no statistical information on private placements prior to 1932. However, * * * the private placement is by no means a novelty, putting in its appearance coincident with the passage of the Securities Act * * *. [I]t appears that in a good many instances subsequent to 1907, and prior to 1933, the insurance companies did in fact purchase securities in substantial blocks directly from issuers.

See also 1 SEC, *Institutional Investor Study Report*, 59 (1971): ("The stock market boom of the 1920's was accompanied by a rather dramatic increase in the institutional share of the market, as investment companies in particular increased their holdings."); *id.* at 58 ("[T]here was greater institutional participation in the 1923-29 boom period, particularly among investment companies, than either before or after 1945 * * *"); Kuhn, *supra* n. 8, at 84 ("[M]any corporations * * * have sold their securities privately. The larger institutions in general have been the principal purchasers of such issuers").

[101] References to investors in the legislative history of the Securities Act are to "the poor woman who ha[d] a little money to invest" (77 Cong. Rec. 2938 (1933) (statement of Rep. Beck)), "poor men and women who turned over their live savings" (*id.* at 2942 (statement of Rep. Cannon)), and "widows who owned Liberty bonds, having invested the accumulations of a lifetime" (*id.* at 2983 (Statement of Sen. Fletcher)), not to sophisticated institutions. Speaking of the "rank and file of the people" who "possess stocks and bonds," Representative Rayburn concluded that "[m]illions of citizens" had been "swindled into exchanging their savings for worthless stocks." 77 Cong. Rec. 2918. Ferdinand Pecora's account of the exhaustive hearings conducted by the Senate Committee on Banking and Currency dealt solely with the abuses suffered by individual investors. *See* F. Pecora, *Wall Street Under Oath* (1939).

[102] Landis, *The Legislative History of the Securities Act of 1933*, 28 Geo. Wash. L. Rev. 29, 37 (1959).

[103] SEC, *25th Annual Report* xviii (1959) (emphasis added). *Cf.* SEC, *18th Annual Report* 1 (1953) (emphasis added): "[T]he prospectus, which must be furnished to prospective investors at or before delivery of the security, effectually brings the prescribed disclosure directly to the attention of the *individual* investor."

Two early bills introduced in the Congress exempted "isolated transactions" in securities, and it was suggested that the proposed legislation should be revised "to exempt from its provisions all types of securities which are not customarily sold to the small investor." [104] This wish was broadly consistent with the developing Congressional decision to "carefully exempt[]" from the application of the Securities Act those "types of * * * securities transactions where there is no practical need for its application or where the public benefits are too remote." [105] H.R. 5480 deleted the isolated transactions exemption and in its place exempted trading transactions [106] as well as private placements; that is, "[t]ransactions by an issuer not with or through an underwriter." [107] A clarifying amendment later added the language "and not involving a public offering" to the latter exemption. This was the form in which the exemption eventually became law.

As Manuel Cohen later explained, this "private placement" exemption had its roots in transactions with institutions that had no practical need for registration protection:

> Private placements had their beginnings and early development in the negotiated sale of specially tailored debt securities to a limited number of large institutional investors who were in a position to insist upon and to receive more information than that provided by registration and to require such protective covenants and restrictions which, together with their ability to supervise constantly and to take appropriate action instantly, supported the view that such offerings were non-public in character for which the registration provisions were probably unnecessary.[108]

In 1934, the phrase "not with or through an underwriter" was eliminated so that the exemption would cover "transactions by an issuer not involving a public offering." The conference report explained that no substantive change was intended:

> The Commission has recognized by its interpretations that a "public offering" is necessary for "distribution." Therefore, there can be no underwriter within the meaning of the act in the absence of a public offer and the phrase eliminated in the second clause is really superfluous.[109]

In 1980, Congress added section 4(6) to the Securities Act.[110] Section 4(6) provides an exemption from registration for certain offers or sales made by an issuer solely to accredited investors[111] without general solicitation.[112] Congress stated in the Report of the Committee sending H.R. 7554 to the House Floor that the "accredited investor" concept is "based on the assumption that accredited investors are sophisticated and able enough to protect their own financial interests without regulatory assistance." [113]

2. Judicial Interpretation

In considering the applicability of the registration provisions of the Securities Act, the courts have focused on the need of investors for the information provided by registration. In *SEC v. Ralston Purina Co.*,[114] the seminal Supreme Court construction of section 4(2) of the Securities Act,[115] the court considered an offering to "key employees," a category defined broadly enough by the company to include many blue collar workers. The company's private placement claim was rejected, the Court reasoning as follows:

> Since exempt transactions are those as to which "there is no practical need for [the registration provisions'] application," the applicability of section 4([2]) should turn on whether the particular class of persons affected needs the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction "not involving any public offering." [116]

Subsequently, the lower courts attempted to implement the Supreme Court's directive to "focus * * * on the need of the offerees for the protections afforded by registration." [117] In this connection, "courts seem never to have doubted that an institutional investor, such as a life insurance company, is sophisticated, since the institution undoubtedly employs investment analysts who are able to ferret out all relevant information and who then carefully consider such information before approving a proposed investment." [118]

Case law dealing specifically with resales to institutional investors is sparse. A notable case holding that institutions are able to "fend for themselves" as envisaged by *Ralston Purina* is *The Value Line Fund, Inc. v. Marcus*, [119] which involved a dispute between a mutual fund and the issuer's principal shareholder and president, as well as his brokerage firm. The principal shareholder had offered stock to several mutual funds, including the plaintiff, through the broker-dealer. After the purchase was made, the stock price declined, whereupon the plaintiff sued for rescission, alleging violations of section 5. The court, however, ruled that the offering was private because all of the offerees "were sophisticated, knowledgeable, experienced institutional investors with great resources, and plainly were 'able to fend for themselves'." [120] Since "[t]he term

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[104] Henderson & Dean, Memorandum on H.R. 4314 Submitted to Rep. Rayburn 2 (Apr. 4, 1933), *reprinted in* I SEC, *Legislative History of the Securities Act of 1933* at tab 18 (available in the SEC library).

[105] H.R. Rep. No. 85, 73rd Cong., 1st Sess. 5 (1933).

[106] *See* 15 U.S.C. 77d(1) (1982), exempting "transactions by any person other than an issuer, underwriter, or dealer."

[107] H.R. 5480, 73 Cong., 1st Sess. section 4(1) (1933).

[108] Cohen, *Federal Legislation Affecting the Public Offering of Securities*, 28 Geo. Wash. L. Rev. 119, 142 n.64 (1959). *Accord*, Kuhn, *supra* n. 8 ("From an institutional viewpoint, the purpose of the Securities Act is primarily to protect the small investor—institutions do not need such protection).

[109] H.R. Report No. 1838, 73d Cong., 2d Sess. 41 (1933). In 1964, this language, originally part of Section 4(1), became Section 4(2).

[110] *See* Small Business Issuers' Simplification Act of 1980, Pub. L. 96-477, section 602, 94 Stat. 2275, 2294 (codified at 15 U.S.C. 77d(6) (1982).

[111] The definition of accredited investors for this purpose included certain individuals.

[112] According to the Commission, "the rationale underlying the adoption of section 4(6) is that financial institutions and other sophisticated investors purchasing in a small private offering are able to 'fend for themselves'." Securities Act Release No. 6256 (Nov. 7, 1980).

[113] H.R. Rep. No. 1341, 96th Cong., 2d Sess. 21 (1980).

[114] 346 U.S. 119 (1953).

[115] 15 U.S.C. 77d(2).

[116] 346 U.S. at 125. Thus, at least in the case of "the larger institutional investor," *Ralston Purina* excuses registration "for obvious reasons." Steffen, *the Private Placement Exemption: What To Do About a Fortuitous Combination in Restraint of Trade*, 30 U. Chi. L. Rev. 211, 220 (1963). "It seems almost tautological to say that persons possessing sufficient knowledge and experience in financial and business matters, so that they are capable of evaluating the risks of an investment, are less in need of the protection of the [A]ct than persons who are not so endowed." Borton & Rifkind, *Private Placement and Proposed Rule 146*, 25 Hastings L. J. 287, 305 (1974).

[117] *Ralston Purina*, 346 U.S. at 127. *See, e.g., General Life of Missouri Investment Corp. v. Shamburger*, 546 F.2d 774, 781 n.10 (8th Cir. 1976); *Stoppelman v. Owens*, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶91,511, at 98,579–80 (D.D.C. 1984) ("prohibited distribution or resale occurs only when the ultimate purchaser of the security is a person or entity that [needs] the information contained in a registration statement").

[118] Note, *Reforming the Initial Sale Requirements of the Private Placement Exemption*, 86 Harv. L. Rev. 403, 415 (1972–1973). *Cf.* Kessler, *Private Placement Rules 146 and 240—Safe Harbor?*, 44 Fordham L. Rev. 37, 40 (1975–1976):

> In this type of placement, the investors, ordinarily all sizeable corporations whose decisions are guided by financial experts, have little need for the protections of the Securities Act. They are well able to take care of themselves, no matter how large or small their investment, or how many investors are included in the group.

See also Comment, *Institutional Investment Through Private Placement of Corporate Securities*, 53 Colum. L. Rev. 804, 807 (1953) ("institutions welcomed the opportunity to assume direct responsibility for their own protection").

[119] [1964–1966 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,523 (S.D.N.Y. 1965) (MacMahon, J.).

[120] *Id.* at 94,970. Additionally, the investors in this case all had access to information about the issuer, an important factor in the courts' analyses of

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'distribution in section 2(11) (of the Act) is substantially equivalent to 'public offering' in section 4([2])," [121] the court held that there was no "distribution." Given the absence of a distribution, there was no "underwriter" within the meaning of section 2(11) of the Act,[122] an exemption from registration was available under Section 4 of the Act, and there was no sustainable claim that section 5 had been violated.[123]

3. Commission Treatment of Institutions; State Laws

The Commission publicly has acknowledged the existence and legality of the private resale market since at least 1959, when it first proposed Rule 155.[124] Rule 155 dealt with convertible and converted securities. Adopted in 1962, it made clear that the ultimate public offering of a security issued upon conversion was subject to section 5 of the Act.[125] What matters for present purposes, however, was the recognition by the Commission in paragraph (b) of the rule that "the initial, and intermediate, holder" of the convertible security, or of the converted security, is not an "underwriter," assuming that the holder did not acquire the security with a view to "distribution" and is not participating in a "public offering." [126]

private offerings: "Marcus clearly gave Value Line access to whatever information it wished, and it is plain that any of the other offerees would have been in a position to insist on complete access to information." *Id.*

[121] *Id.* at 94,969 citing *Gilligan, Will & Co. v. SEC,* 267 F.2d 461, 466–68 (2d Cir.), *cert. denied,* 361 U.S. 896 (1959).

[122] 15 U.S.C. 77b(11).

[123] *See The Value Line Fund,* Fed. Sec. L. Rep. ¶ 91,523 at 94,969, 94,972; *infra* text accompanying n. 144. *See also Neuwirth Investment Fund, Ltd. v. Swanton,* [1975–1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,372 (S.D.N.Y. 1975), which also involved resales to institutional investors; specifically, to two registered investment companies. The court basically adhered to the *Ralston Purina-Value Line* approach, considering the following factors in determining the availability of section 4(1): "the number of offerees, the offerees' access to relevant information and the purchaser's intent at the time of purchase." The offerees numbered no more than four. Moreover, as in *Value Line,* they "possessed enough sophistication to demand, and enough leverage at the bargaining table to receive, all information relevant to make a fully informed decision on whether or not to buy." *Id.* at 98,862.

[124] *See* Securities Act Release No. 4162, [1957–1961 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,677 (Dec. 2, 1959). Rule 155 was revised and reproposed in Securities Act Release No. 4248, (1957–1961 Transfer Binder) Fed. Sec. L. Rep. (CCH) ¶ 76,710 (July 14, 1960).

[125] *See* Securities Act Release No. 4450 (1961–1964 Transfer Binder) Fed. Sec. L. Rep. (CCH) ¶ 76.821 (Feb. 7, 1962).

[126] 17 CFR 230.155(b) (rescinded 1972).

In the view of one commentator, this was a signal development in that it justified the private placement secondary market:

> [T]o have it declared that the intial placee, and "any intermediate" placee, may make such private sales as they please, was a positive gain * * *. It is true the Rule applies in terms only to convertible and converted securities, but, that being so, there is no apparent reason why it should not apply, a fortiori, to any security.[127]

Rule 155 was rescinded prospectively upon the adoption of Rule 144 [128] and rescinded altogether in 1979.[129]

In June 1988, the Commission addressed the needs of institutional investors when it issued for comment a proposed rule [130] that would exempt from the broker-dealer registration requirements [131] foreign broker-dealers that engage in securities transactions only with specified U.S. institutional investors under limited conditions. Such activities would have to be conducted through a U.S. affiliate of the foreign broker-dealer. For purposes of the proposed rule, a U.S. institutional investor was defined as an entity that, *inter alia,* was described in Rule 501(a) (1), (2), or (3) of Regulation D under the Securities Act [132] and that, with the exception of registered broker-dealers, had total assets in excess of $100 million. While not treated as an accredited investor under Regulation D, a registered investment adviser also would be included as a U.S. institutional investor within the proposed rule if it had $100 million in assets under management. Further, if a registered investment company itself did not have total assets in excess of $100 million, it could still qualify as a U.S. institutional investor if it was part of a "family" (as defined) of investment companies that had total assets in excess of $100 million.

Exemptions for sales to institutional investors, whether by issuers or by third parties, are a common provision of state securities laws. All blue sky statutes that provide for registration of securities exempt institutional resales to some

[127] Steffen, *The Private Placement Exemption: What To Do About a Fortuitous Combination in Restraint of Trade,* 30 U. Chi. L. Rev. 211, 228 (1963).

[128] *See* Securities Act Release No. 5223, [1971–1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,487, at 81,064 (Jan. 11, 1972) (37 FR 591).

[129] *See* Securities Act Release No. 6032, [1979 Transfer Binder] Fed. Sec. L.Rep. (CCH) ¶ 81.992 (Mar. 5, 1979) (44 FR 15610).

[130] Proposed Rule 15a–6(a) [17 CFR § 240.15a–6], proposed in Exchange Act Release No. 25801 (June 14, 1988) (53 FR 23645).

[131] Section 15(b) of the Exchange Act (15 U.S.C. 78*o*(b))

[132] 17 CFR 230.501(a)(1), (2) or (3).

extent.[133] The draftsmen's commentary to the Uniform Securities Act states:

> The obvious justification for this exemption is that institutional investors and broker dealers are "sophisticated" buyers who do not need the protection of registration. At the same time they do have the protection of the antifraud provisions of §§ 101 and 410(a)(2).[134]

B. Present Legal Basis for Institutional Sales

Section 4(2) of the Securities Act provides an exemption from registration for "transactions by an issuer not involving any public offering." [135] Within the parameters of section 4(2), Rule 506 of Regulation D [136] provides a non-exclusive safe harbor for offerings made in accordance with its terms. This rule imposes a filing requirement, prohibits general solicitation, and requires the provision of information in circumstances where persons other than accredited investors are among the purchasers. In general, private placements with large institutions are made in reliance on section 4(2) rather than on the safe harbor provisions of Regulation D.[137]

[133] Section 402(b)(8) of the Uniform Securities Act of 1956 provides an exemption from registration for "any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity."

Section 402(b)(8) has been adopted, or substantially adopted with modifications, in 38 jurisdictions. In addition, those jurisdictions which have not adopted that section all have some provision for an exemption for sales to some classes of institutional inventors. Some jurisdictions have expanded the exemption to include sales to certain corporations and non-profit organizations. The Uniform Securities Act of 1985, which has been adopted by three jurisdictions, contains an exemption similar to that in the 1956 Act. Section 402((10) of the 1985 Act provides an exemption for "an offer to sell or sale of a security to a financial or institutional investor or to a broker-dealer." Unif. Sec. Act (1985) 402(10). Section 101(5) of the 1985 Act defines the term "financial or institutional investor" as including, in addition to those institutions enumerated in the 1956 Act, "an employee pension, profit-sharing, or benefit plan if the plans has total assets in excess of $5,000,000 or its investment decisions are made by a named fiduciary as defined in the Employee Retirement Income Security Act of 1974, that is either a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, a depository institution or an insurance company."

[134] L. Loss & E. Cowett, *Blue Sky Law* 367, draftsmen's commentary to Uniform Securities Act, 402(b)(8) (1958).

[135] 15 U.S.C. 77d(2).

[136] 17 CFR 230.506.

[137] 17 CFR 230.501–230.506; *see* Market Participation, *supra* n. 17.

No specific statutory exemption exists for non-public offerings by persons other than issuers. Instead, section 4(1) of the Securities Act provides that the registration requirements of section 5 shall not apply to "transactions by a person other than an issuer, underwriter or dealer." [138] The term "underwriter" is defined in section 2(11) of the Securities Act to include, with certain exceptions not relevant here,

> any person who has purchased from an issuer or with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in the direct or indirect underwriting of any such undertaking * * *.[139]

With respect to transactions by a dealer,[140] section 4(3) of the Securities Act provides an exemption, with certain exceptions. The exemption is not available if the dealer is selling securities within 40 days after "the first date upon which the security was bona fide *offered to the public* by the issuer or by or through an underwriter * * *."[141] Nor is it available with respect to "transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the *distribution* of such securities by the issuer or by or through an underwriter." [142]

In the absence of a distribution, a non-issuer transactions is exempt from the registration requirements of section 5; a seller who is a dealer may use the section 4(3) exemption,[143] and a non-dealer may use the section 4(1) exemption. The absence of a "distribution" can be determined in a variety of ways.[144]

The key to the analysis of proposed Rule 144A is that certain institutions can fend for themselves and that, therefore, offers and sales to such institutions do not involve a public offering. "The Commission has recognized by its interpretations that a 'public offering' is necessary for 'distribution.' " [145] Since the offering to eligible institutions under proposed Rule 144A is not public, no distribution takes place, and an exemption from registration would be available.

V. Proposed Rule 144A

A. General

Proposed Rule 144A sets forth a non-exclusive safe harbor from the registration requirements of section 5 of the Securities Act for the sale of securities to specified institutions by persons other than the issuer of such securities. The transactions covered by the safe harbor are those private transactions that on the basis of a few objective standards can be defined as outside the purview of section 5, without the necessity of undertaking the more usual analysis under sections 4(1) and 4(3) of the Securities Act. The Commission wishes to emphasize that proposed Rule 144A is not intended to preclude reliance on traditional facts-and-circumstances analysis to prove the availability of an exemption outside the safe harbor it provides.

The Rule would provide that, if its conditions were met, any person (other than the issuer or a dealer) who offered or sold securities would be deemed not to be engaged in a "distribution" and therefore not to be an "underwriter" within the meaning of secitons 2(11) and 4(1) of the Securities Act.[146] Similarly, if the conditions of the proposed Rule were met, a dealer would be deemed not to be a participant in the "distribution" of securities within the meaning of seciton 4(3)(C) of the Act, and the securities would be deemed not to have been offered "to the public" within the meaning of section 4(3)(A) of the Act.[147] The Rule, in effect, defines a class of transactions as outside the term "distribution." It does not, however, provide the exclusive means to establish the lack of a "distribution," and thus an exemption from the Securities Act registration requirements.[148] Each transaction would be assessed under the Rule indiviudually. The exemption for an offer and sale complying with the Rule would be unaffected by other transactions of the seller.

Nothing in the Rule would remove the neeed to comply with any applicable state law relating to the offer and sale of

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[138] 15 U.S.C. 77d(1).

[139] 15 U.S.C. 77b(11). Thus, in exempting specified trading transactions from registration under section 4(1) of the Securities Act, Rule 144(b) (17 CFR 240.144(b)) states that a person selling securities under the conditions specified in the rule "shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter thereof within the meaning of section 2(11) of the Act * * *."

[140] Under section 2(12) of the Securities Act (15 U.S.C. 77b(12), "(t)he term 'dealer' means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of trading in securities issued by another person." It thus encompasses both brokers and dealers, as defined in the Exchange Act. *See* sections 3(a)(4) and 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(4), 78c(a)(5)).

[141] Section 4(3)(A) of the Act (15 U.S.C. 77d(3)(A)) (emphasis supplied); *see also* section 4(3)(B) (15 U.S.C. 77d(3)(B)), with respect to transactions taking place within 40 days after the effective date of a registration statement covering the securities or the first bona fide offering of those securities.

[142] Section 4(3)(C) of the Act (15 U.S.C. 77d(3)(C)) (emphasis supplied).

[143] *See* Throop & Lane, *Some Problems of Exemption Under the Securities Act of 1933*, 4 Law & Contemp. Prob. 89, 121 (1937).

[144] *See, e.g.*, Preliminary Note to Rule 144 (17 CFR 230.144): "In determining when a person is deemed not to be engaged in a distribution several factors must be considered."

[145] H.R. Rep. No. 1838, 73 Cong., 2d Sess. 41 (1934); *see supra* text accompanying n. 109; H.R. Rep. No. 85, 73d Cong., 1st Sess. 13–14 (1933) (affiliates are treated as issuers for purposes of the definition of underwriter in section 2(11) of the Securities Act, because a "redistribution" of outstanding stock in a "public offering may possess all the dangers attendant upon a new offering of securities."); *Gilligan, Will*, 267 F.2d at 466; Loss, *Fundamentals of Securities Regulation* 255 (2d ed. 1988); Whitney, *Rule 10b–6: The Special Study's Rediscovered Rule*, 62 Mich. L. Rev. 567 (1964) (also noting that the term "distribution" used in Rule 10b–6 under the Exchange Act is not limited to offerings required to be registered under the Securities Act); 1 L. Loss, *Securities Regulation* 551 (2d ed. 1961); Throop & Lane, *supra* n. 143, at 116–17.

The Commission stated in *In the Matter of Oklahoma-Texas Trust*, 2 SEC 764, 769 (1937), *aff'd*, 100 F.2d 888 (10th Cir. 1939), that "distribution, although not expressly defined in the [Securities] Act, comprises the entire process by which in the course of a public offering a block of securities is dispersed and ultimately comes to rest in the hands of the investing public." *See Securities Industry Ass'n v. Board of Governors*, 807 F.2d 1052, 1062–64 (D.C. Cir.) (construing the term "underwriting," as used in the Glass-Steagall Act, to mean a public offering, in reliance on Congress' understanding that, under the Securities Act, legislation enacted contemporaneously, a distribution, and thus an underwriting, involves a public offering), *rev'g* 627 F. Supp. 695, 709 (D.D.C. 1986) (ruling that "distribution" in the Securities Act does not mean only public offerings), *cert. denied*, 107 S. Ct. 3228 (1987). The district court opinion in that case had cited the Commission release adopting Rule 3b–9 under the Securities Exchange Act (17 CFR 240.3b–9 (1987)), which was subsequently invalidated by the United States Court of Appeals for the District of Columbia Circuit. *American Bankers Ass'n v. SEC*, 804 F.2d 739 (1986); *see* Exchange Act Release No. 22205 (July 12, 1985) (50 FR 28325, 28392 n. 58) ("Rule 3b–9 release"). In the Rule 3b–9 release, the Commission had stated that "the fact that an offering is exempt from registration pursuant to one of the exemptions specified in paragraph (b)(6) (of Rule 3b–9) does not necessarily mean that no 'distribution' has occurred as that term is used in the definition of 'underwriter' in section 2(11) of the Securities Act of 1933." 50 FR 28392 n. 58. Among other exemptions specified in paragraph (b)(6) of Rule 3b–9 was section 3(b) of the Securities Act (15 U.S.C. 77c(b)), which encompasses transactions that are public offerings. Footnote 58 of the Rule 3b–9 release should not be read as a Commission statement that a "non-public offering" can be a "distribution."

[146] *See* paragraph (b) of the Proposal. This formulation was used by the Commission in establishing Rule 144. *See* Rule 144(b) (17 CFR 230.144(b)), *supra* n. 139.

[147] *See* paragraph (c) of the Proposal.

[148] *See, e.g.*, Rule 144 under the Securities Act (17 CFR 230.144).

securities.[149] Similarly, the Rule does not affect the securities registration requirements of section 12 of the Exchange Act or the broker-dealer registration requirements of section 15(a) of the Exchange Act for a broker or dealer who effects private placement transactions.[150]

Resales made in reliance on proposed Rule 144A could only be made to the institutions specified in the three tiers of the Rule or to persons the seller reasonably believed were such institutions. Sales to individual investors could not be made in reliance on Rule 144A. Sales to individuals would continue to be subject to the traditional analysis under section 4(1) or 4(3) of the Securities Act.[151]

The Rule is not intended to eliminate or otherwise affect the availability of any exemption for resales under the Securities Act on which a seller might be able to rely.[152] Securities sold in reliance on Rule 144A would not be included in determining the amount of securities which could be sold by a person in compliance with the volume limitations in subsection (e) of Rule 144.[153]

There may be some concern regarding possible integration of an otherwise exempt transaction with resales under Rule 144A. In order to eliminate uncertainty in this area, the proposed Rule specifically provides that resales made in reliance on Rule 144A shall be deemed not to affect the availability of any exemption for the previous or subsequent sale of the securities by the issuer or any prior or subsequent holder.[154]

Foreign issuers may have concerns regarding inadvertent entry into the Exchange Act registration and reporting system if the proposed Rule is used to make resales in the United States. Rule 12g3–2(a) provides an exemption from the reporting requirements of section 12(g) of the Exchange Act for classes of securities of foreign private issuers held by fewer than 300 U.S. residents.[155] If that threshold is reached, Rule 12g3–2(b) under the Exchange Act at present provides an exemption from this obligation for a foreign private issuer if it furnishes to the Commission specified information it otherwise makes publicly available.[156] As noted above, the Commission is concerned that the availability of Rule 12g3–2(b) may be inappropriate if a large U.S. non-NASDAQ, non-exchange market develops for a foreign issuer's securities, and has requested comments on that issue.[157] Even if the Commission eventually were to determine to eliminate or limit the availability of Rule 12g3–2(b) in the case of substantial market activity, it would retain the power under section 12(h) of the Exchange Act [158] to exempt an issuer by order from, *inter alia*, the reporting requirements of section 12(g), where it finds such exemption appropriate and in the public interest. Thus, for example, the Commission could provide specific relief where a substantial market is shown to be composed largely of institutional holders.

B. The Three Tiers of the Rule

Proposed Rule 144A contains three tiers. The Commission solicits comment on adoption of each of the three separately and in any combination, as well as adoption of different tiers at different times.

The first, or qualified institutional buyer, tier would cover any securities of any issuer.[159] It would not require the seller to take any specific steps to prevent an unregistered distribution, other than taking reasonable steps to ensure that the buyer is aware that the seller may rely on the exemption from the Securities Act registration requirements provided by the Rule. This tier would, however, be limited to potential buyers that are very large institutions, long involved in the resale market for restricted securities, as to which there has been little concern with respect to section 5 implications. The breadth of the securities covered by this tier of the proposed Rule gives full effect to the concept that these large institutional investors are fully able to fend for themselves.

The second, or non-fungible securities, tier of the proposed Rule is less restricted as to potential purchasers, but more restricted as to the types of securities covered.[160] The securities covered would be non-convertible debt securities, non-convertible preferred stock, and securities issued by reporting companies. Historically, a wide range of institutions has been engaged in the private resale market for senior securities. These institutions may not need the protections attendant to registration under the Securities Act with respect to such senior securities. Furthermore, where the information required by the Exchange Act is publicly available, institutions of this broader class may be able adequately to fend for themselves even with respect to common equity securities.

The securities that could be sold under this tier of the proposal must be of a class that is not publicly traded in the United States. Given this requirement of non-fungibility, the securities would be less likely to leak into the public, retail, markets. With the general lack of a public market for the securities, it would not be difficult to identify and trace such securities in the event of leakage. Moreover, in the case of debt and preferred stock, the market is generally institutional. Thus, like the qualified institutional buyer tier of the proposed Rule, the non-fungible securities tier would not impose resale restrictions.

The third tier of the Rule would cover offers and sales of securities of a class that is publicly traded in the United States, to the same range of institutions covered by the non-fungible securities tier.[161] Like the non-fungible securities tier, the covered securities are limited to non-convertible debt, non-convertible preferred stock and securities issued by reporting companies. Given the greater likelihood for leakage of fungible securities into the retail markets and the greater difficulty in tracing that leakage, this tier of proposed Rule 144A would require the seller to take reasonable steps to prevent the purchaser from reselling the securities in the United States in an unregistered, non-exempt distribution.

C. The Qualified Institutional Buyer Tier

1. Qualified Institutional Buyers

The first tier of proposed Rule 144A would permit resales of any securities of any issuer to a class of institutional investors defined as "qualified institutional buyers." [162] Under the

[149] *See* Preliminary Note 3 of the Proposal. *See also supra* n. 133.

[150] 15 U.S.C. 78*l*, 78*o*(a). *See* Preliminary Note 2 of the Proposal. Likewise, the proposed Rule would have no effect on the application of Rule 10b–6 under the Exchange Act (17 CFR 240.10b–6) to an offer and sale of securities pursuant to Rule 144A "that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods." Rule 10b–6(c)(5) (17CFR 240.10b–6(c)(5)).

[151] *See supra* text accompanying nn. 138–144.

[152] *See* Preliminary Note 1 of the Proposal.

[153] *See* Rule 144(e)(3)(vii) under the Securities Act (17 CFR 230.144(e)(3)(vii)).

[154] *See* paragraph (e) of the Proposal.

[155] 17 CFR 240.12g3–2(a).

[156] 17 CFR 240.12g3–2(b). Information furnished pursuant to Rule 12g3–2(b) is not deemed "filed" with the Commission or otherwise subject to the liabilities of Section 18 of the Exchange Act (15 U.S.C. 78r).

[157] *See supra* text accompanying n. 96–97.

[158] 15 U.S.C. 78*l*(h).

[159] *See* paragraph (d)(1) of the Proposal.

[160] *See* paragraph (d)(2) of the Proposal.

[161] *See* paragraph (d)(3) of the Proposal.

[162] *See* paragraph (d)(1) of the Proposal.

proposal, resale would be permitted if the purchaser was a qualified institutional buyer or its nominee, or if the seller and any persons acting on its behalf reasonably believed that the purchaser was such an eligible buyer or its nominee. In determining whether a particular entity is a qualified institutional buyer, the seller and any person acting on its behalf would be permitted to rely on financial statements or other material filed with the Commission, unless the seller or any person acting on its behalf knew or had reason to believe that the buyer was not a qualified institutional buyer.[163]

Qualified institutional buyers are defined in the proposed Rule to include institutional buyers [164] that have total assets in excess of $100 million.[165] While the rule excludes corporations, partnerships, business trusts and charitable organizations formed for the purpose of acquiring the securities offered, the Commission is considering and requests comment on inclusion of such entities in the qualified institutional buyer tier because of their size. This tier of the Rule specifically includes investment advisers as eligible buyers. Eligibility is conditioned upon their having in excess of $100 million combined assets and assets under management.[166] Comment is requested as to whether registered investment advisers should be specifically included as qualified institutional buyers, and as to the appropriateness of the asset test proposed. Also included are investment companies that are part of a family of related investment companies that has aggregate total assets in excess of $100 million.[167] An entity also would be included if all of its equity owners were qualified institutional buyers.[168]

In defining a "qualified institutional buyer," the Commission has attempted to establish a level at which it can be confident that participating investors have extensive experience in the private resale market for restricted securities. In addition, the Commission is seeking to identify a class of investors that can be conclusively assumed to be sophisticated and in little need of the protection afforded by the Securities Act's registration provisions.

The $100 million threshold for assets or funds under management, moreover, follows that set forth in proposed Rule 15a-6 under the Exchange Act, which exempts from the broker-dealer registration provisions foreign broker-dealers doing business only with major institutional investors.[169] The proposed asset limitation in Rule 15a-6(a) is based on the view that direct U.S. oversight of foreign sales personnel might be of less significance where such personnel solicit only U.S. institutional investors with high levels of assets. The $100 million asset level, derived from the reporting standard of section 13(f) of the Exchange Act,[170] is designed to increase the likelihood that the institution would have prior experience in foreign markets that provided insight into the reliability and reputation of various foreign broker-dealers.

Comment also is requested on the appropriateness of the threshold proposed for identifying those institutions with the least need for the protection provided by registration. Should the treshold be lower (for example, assets of $50 million) or higher (assets of $150 million or $200 million)? Comment is further requested on whether the qualified institutional buyer tier should contain more stringent purchaser qualifications than those suggested in the proposal, such as including fewer categories of institutions, or imposing different asset tests for different types of institutional investors. Would a net worth test be preferable to an asset test, and if so, what level would be appropriate—$10-$25-$50-$100-million? Finally, comment is specifically requested as to whether a "reasonable belief" standard regarding the purchaser's qualifications is appropriate in this tier of the proposed rule.

2. Securities Covered

The qualified institutional investor tier of the proposed Rule would apply to any securities of any issuer. As drafted, this tier of the proposal would not require that buyers be provided with any information regarding the issuer of the securities sold. Comment is requested on whether the proposed Rule should require that an issuer undertake either in the terms of the security or by contract to provide upon request of the security holder basic information concerning the issuer. Commenters who believe that access to information should be required should also address what information should be required. Should the level of information be comparable to that required under Rule 15c2-11 of the Exchange Act,[171] or should more or less extensive information be required? Should an access requirement be limited to information the issuer provides to holders of its publicly traded securities, if any? The Commission also requests comments as to whether if access is to be mandated, there are other more efficient and less costly means of providing adequate information.

3. Resale Restrictions

Based on the sophistication and experience in the private resale market of the proposed class of qualified institutional buyers, this tier of the proposed Rule does not impose resale restrictions. It would require only that the seller or any person acting on its behalf take reasonable steps to ensure that each buyer is aware that the seller may rely on the registration exemption provided by Rule 144A.[172] It is the Commission's understanding that, under current industry practice, the obtaining of agreements as to the manner of resale is considered unnecessary in many cases where large institutional investors are involved, because they are sufficiently aware of the resale limitations on restricted securities and their potential liabilities under section 5 for improper disposition of such

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[163] *See* paragraph (d)(1)(i) of the Proposal.

[164] "Institutional buyers" are eligible to purchase under the non-fungible securities and fungible securities tiers of the Proposal. *See infra* Sections V.D.1. and V.E.1. This term generally includes the types of institutional investors permitted to purchase from the issuer under Regulation D under the Act. The qualified institutional buyer tier omits the asset tests set by Regulation D for certain institutions because it provides its own asset tests.

[165] *See* paragraph (a)(2) of the Proposal. Under paragraph (a)(3) of the Proposal, "total assets" is generally determined in accordance with the provisions of Regulation S-X under the Act (17 CFR Part 210) and refers to the larger of the person's total assets or the total assets of the person and its consolidated subsidiaries.

[166] *See* paragraphs (a)(2)(ii) and (a)(3)(ii) of the Proposal. With respect to investment advisers registered under the Investment Advisers Act, and solely for purposes of the qualified institutional buyer tier, "total assets" includes any assets as to which the investment adviser, as an investment manager, exercises investment discretion, in addition to the total assets of the investment adviser. See paragraph (a)(3)(ii) of the Proposal.

[167] *See* paragraph (a)(2)(iii) of the Proposal.

[168] *See* paragraph (a)(2)(iv) of the Proposal.

[169] *See supra* text accompanying nn. 130-132. Proposed Rule 15a-6, however, does not include a "reasonable belief" standard as regards an institution's meeting the $100 million threshold.

[170] 15 U.S.C. 78m(f).

[171] 17 CFR 240.15c2-11. Information required under this rule would include, for non-reporting issuers, information regarding the issuer and its business, the issuer's most recent balance sheet and profit and loss and retained earnings statements for the last two years; or the information filed with the Commission pursuant to Rule 12g3-2(b) (*See supra* n. 156). In the case of foreign issuers, if information was mandated, use of financial statements prepared under accounting principles of foreign jurisdictions would be acceptable. Audited statements would not be required.

[172] *See* paragraph (d)(1)(ii) of the Proposal. See the discussion and solicitation of comments in Section V.E.3. below concerning the adequacy of that notice procedure.

securities. In such cases, therefore, buyers would be expected to take adequate steps to guard against a subsequent unregistered and non-exempt distribution of the securities sold under proposed Rule 144A without any policing by the seller.

Where the required notice was given, a seller's transaction would be protected by the safe harbor, notwithstanding any unregistered, *non-exempt* offer or sale by a purchaser in the United States. In such cases the reselling purchaser would violate section 5, but not the prior holder that sold in compliance with the safe harbor rule.

D. The Non-Fungible Securities Tier

1. Institutional Buyers

Institutions specified in the non-fungible securities tier of proposed Rule 144A as eligible "institutional buyers" include banks, broker-dealers, insurance companies, investment companies and certain employee benefit plans, and private business development companies.[173] Corporations, charities, and partnerships would be included to the extent that they had assets in excess of $5 million.[174] An entity also would be included if all its equity holders were institutional buyers.[175] Investment advisers are not specifically included, but would be eligible institutional buyers to the extent that they were corporations or partnerships with total assets over $5 million.[176] Comment is sought on the appropriateness of specifically including investment advisers with total assets over $5 million, or whether only investment advisers with some higher amount of total assets should be specifically included. Comment is also requested as to whether assets under management should be included in determining total assets for investment advisers. Finally, the Commission requests comment on whether there should be an asset test (*e.g.*, $10 million, $25 million) applicable to all institutional purchasers covered by this second tier.

The Commission currently has a proposal pending to add certain pension plans established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions for the benefit of its employees to the list of accredited investors under the Regulation D.[177] The Commission plans to include in the list of institutional buyers in paragraph (a)(1)(i) of proposed Rule 144A those plans that ultimately are defined to be accredited investors for purposes of Regulation D.

As is the case with the qualified institutional buyer tier, the seller would be permitted to rely on the exemption provided by the non-fungible securities tier of the proposed Rule even if the buyer was not an eligible institutional buyer, provided that the seller and any person acting on its behalf reasonably believed that the purchaser was such an eligible person.[178] Comment is requested as to the appropriateness of this reasonable belief standard for the non-fungible securities tier.

2. Securities Covered

The availability of the non-fungible securities tier is limited to securities of a class that is neither quoted in an inter-dealer quotation system within the meaning of Rule 15c2-7(c) under the Exchange Act [179] nor listed on a national securities exchange registered under Section 6 of the Exchange Act.[180] This tier of the Rule also would not be available for securities issued by an open-end investment company, unit investment trust or face-amount certificate company that is registered under section 8 of the Investment Company Act. The second tier is thus limited to securities that are not publicly traded in the United States, but would cover securities that are publicly traded outside this country. American Depository Receipts and the underlying foreign securities would be viewed as separate classes of securities for purposes of the Proposed Rule. Comment is requested as to this proposed separate treatment.

In addition to being non-fungible, securities covered by the non-fungible securities tier must be either non-convertible debt securities or non-convertible preferred stock, or be issued by a company subject to the reporting obligations imposed under the Exchange Act.[181]

The current resale market for restricted securities largely involves debt and preferred stock. Such senior securities are commonly held by institutions, making resale into the retail markets less likely than with common stock. These securities also are generally issued in distinct classes or series, making it more likely that the securities can be traced in the event that leakage does occur.

The Commission requests comment on the appropriateness of including in the non-fungible securities tier all non-convertible debt securities and non-convertible preferred stock, including those debt or preferred securities that by their subordination or other terms trade more like common equity and less like senior securities. Is the need for issuer information so much greater in the case of non-investment grade debt and preferred stock that the rule should be limited to the more senior securities? Alternatively, recognizing that privately placed securities may not be rated, should this tier require that the issuer have outstanding at the time of the transaction securities rated investment grade by one or more nationally recognized statistical rating organizations and that the securities offered and sold in reliance on the Rule rank *pari passu* or senior to the issuer's investment grade securities?

In addition, common equity could be offered and sold in reliance on the non-fungible securities tier if it were issued by a reporting company. This requirement for the availability of information assures the broad range of institutions covered by the second tier will have access to the same issuer information that would have been made available in a registration statement under the Securities Act. To be eligible, issuers must have been subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act for a period of at least 90 calendar days immediately preceding the offer or sale, and have filed all reports required to be filed pursuant to those provisions for at least a year (or such shorter period that the issuer was required to file such reports).[182]

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[173] *See* paragraphs (a)(1)(i) and (a)(1)(ii) of the Proposal.

[174] *See* paragraph (a)(1)(iii) of the Proposal. The term "institutional buyer" encompasses substantially the same institutions as those specified in Rule 215 and Regulation D under the Securities Act. Self-directed pension plans, which relate to individuals, are omitted.

[175] *See* paragraph (a)(1)(iv) of the Proposal.

[176] For purposes of the non-fungible securities tier (as well as the fungible securities tier), "total assets" is limited to the total assets of the person or of that person and any consolidated subsidiaries thereof, whatever is larger and does not include assets under management. *See* paragraph (a)(3) of the Proposal.

[177] Securities Act Release No. 33-6759 (March 3, 1988) (53 FR 7870).

[178] *See* paragraph (d)(2)(i) of the Proposal.

[179] CFR 240.15c2-7(c). This tier thus not only excludes securities quoted in an automated inter-dealer quotation system (NASDAQ), but also those securities quoted in the "pink sheets."

[180] 15 U.S.C. 78f. *See* paragraph (d)(2)(ii) of the Proposal.

[181] *See* Sections 13(a) and 15(d) of the Exchange Act (15 U.S.C. 78m, 78 (d) and the rules thereunder; paragraphs (d)(2)(ii) (A) and (B) of the Proposal.

[182] *See* paragraph (d)(2)(iii)(A) of the Proposal. The criteria to be met by the issuer are the same as those set forth in Rule 144 (17 CFR 230.144 (1987). In determining whether or not the issuer has complied with this requirement, a seller would be entitled to rely on either a written statement from the issuer or

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The Commission requests comment on the appropriateness of omitting the requirement that the issuer be a reporting company in the case of debt securities and preferred stock. In the event that the issuer is not a reporting company, should the rule require that the issuer undertake either as a term of the security or contractually to provide the holder of the security, upon request, certain basic information, such as that specified in Rule 15c2–11 under the Exchange Act? [183] Should such a requirement be imposed only for preferred stock and non-investment grade debt, since investment grade debt trades primarily on the basis of yield and rating, rather than on publicly available information? Finally, the Commission requests comment on whether the requirements that the securities be issued by a reporting company or be non-convertible debt securities or non-convertible preferred stock are unnecessary for the protection of the institutinal buyers covered by the non-fungible securities tier.

3. Resale Restrictions

As under the qualified institutional buyer tier of the proposed Rule, the non-fungible securities tier imposes no resale restrictions. The lack of required resale restrictions in the non-fungible securities tier of the Rule reflects the private resale market's extensive experience with senior securities, the traditionally institutional nature of the market for those securities, and the ability to trace any leakage of restricted securities into the retail markets where a public market does not otherwise exist.

The non-fungible securities tier, like the qualified institutional buyer tier, does, however, require that the seller or any person acting on its behalf take reasonable steps to ensure that the purchaser is aware that the seller may rely on the exemption from registration provided under Rule 144A.[184] Where the mandated procedure was followed, a seller would be entitled to rely on the safe harbor provided by the proposed Rule, even if the buyer subsequently offered or sold the securities in the United States in an unregistered, *non-exempt* transaction. If that occurred, the reselling purchaser would violate Section 5, but not the prior holder that sold in compliance with the safe harbor rule.

E. The Fungible Securities Tier

1. Institutional Buyers

Eligible offerees and purchasers under the fungible securities tier of proposed Rule 144A are the same as those under the non-fungible securities tier.[185] Commentators should address the questions raised with respect to eligible purchasers under the non-fungible securities tier of the proposed Rule with respect to the fungible securities tier as well.[186]

2. Securities Covered

The distinction between the securities covered by this third tier and the second tier is that the third tier covers non-convertible debt, non-convertible preferred stock and securities issued by reporting companies of a class that is quoted in an inter-dealer quotation system or listed on a registered national securities exchange, as well as such securities issued by open-end investment companies, face-amount certificate companies and unit investment trusts registered under section 8 of the Investment Company Act.[187] However, any securities that could be offered or sold under the second tier could also be traded under the third. As in the case of the non-fungible securities tier, the Commission requests comment on whether the requirements that the securities be issued by a reporting company or be non-convertible debt securities or non-convertible preferred stock are unnecessary for the protection of the institutional buyers involved.

3. Resale Restrictions

In contrast to the qualified institutional buyer and non-fungible securities tiers of the proposed Rule, the fungible securities tier of the proposed Rule would impose resale restrictions. Under this tier, an offer or sale of securities would be protected by the safe harbor only where made pursuant to procedures designed to prevent "leakage" of the securities into the retail market in such a manner as to result in an unregistered public offering.

The proposed Rule would require that the seller or any person acting on its behalf take reasonable steps to prevent the purchaser of such securities from reselling the securities in the United States without registration or an available exemption.[188] Where precautionary procedures were implemented and followed properly, a seller's transaction would be protected by the safe harbor, notwithstanding any subsequent *non-exempt* unregistered distribution by a purchaser. In such cases, the reselling purchaser would be in violation of section 5, but not the prior holder that sold in compliance with the safe harbor rule.

The Rule provides that reasonable steps to guard against an unregistered, non-exempt public offering would be conclusively established where the purchaser agreed in writing not to resell the securities in the United States absent registration or an applicable exemption, and the securities were in registered (as opposed to bearer) form, and appropriately legended [189] or subject to stop transfer instructions in the case of non-exempt transactions not registered under the Securities Act.[190] These are traditional precautions that have been taken to guard against an unregistered public offering, particularly in the case of common equity. These steps would provide a non-exclusive means of demonstrating compliance with the mandated precautionary procedure. The seller's failure to take the particular steps specified in the Rule would not create a presumption that it had acted unreasonably. In the absence of taking the specified steps, the seller would remain free to establish that reasonable steps had been taken to prevent an unregistered distribution in the United States by the buyer through other means.

The Commission requests comment on whether the measures proposed as conclusive proof that the seller acted reasonably to prevent an unregistered, non-exempt distribution are adequate. Commenters are also requested to address whether there are more efficient and effective means of protecting against retail leakage.

An alternative method of protecting against an unregistered public offering is to establish trading systems that limit trading to qualifying institutions and establish depositary and clearance

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statements in reports filed by the issuer with the Commission indicating that the issuer has met this requirement. The annual report on Form 10–K (17 CFR 249.310, the quarterly report on Form 10–Q 17 CFR (249.308a), and Form 20–F (17 CFR 249.220f) (on which annual reports are made by foreign issuers) require that the filer indicate whether it "(1) has filed all reports required to be filed by section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days."

[183] *See supra* text accompanying nn. 171.

[184] *See* paragraph (d)(2)(iv) of the Proposal. See discussion and solicitation of comments in Section V.E.3. below concerning the adequacy of that notice procedure.

[185] *See* paragraph (d)(3)(i) of the Proposal.

[186] *See supra* Section V.D.1.

[187] *See* paragraph (d)(3)(ii) of the Proposal.

[188] *See* paragraph (d)(3)(iii) of the Proposal.

[189] *See* 17 CFR 230.502(d).

[190] *See* pargraph (d)(3)(iii)(A) and (B) of the Proposal.

systems such that trades may be made only to other such institutions. The American Stock Exchange and the National Association of Securities Dealers both have announced plans to establish such systems for the trading of unregistered securities.[191]

The operating procedures for such systems have not yet been finalized. However, the Commission, as an alternative to the procedures described above, could deem a system to establish adequate procedures under Rule 144A if it (i) provided for a deposit or book entry of securities, (ii) restricted transferees to qualifying institutions buying for their own account or the account of other qualifying institutions, and (iii) limited the transactions allowed for exiting the closed system to those adequately documented and verifiable transactions that were not subject to registration under the Securities Act (for example, sales made under proposed Regulation S). In addition, such system would provide adequate surveillance procedures for the market and the Commission to verify that such eligibility criteria were maintained. Sellers of securities in such systems, by compliance with the terms of such systems, could meet the requirements of Rule 144A. They would not be required to inquire as to the purchaser's status or obtain its written agreement to resell the securities in accordance with the Rule, as these functions would be performed through the operating procedures of the closed system. Participation in such a system would be conditional only within that system or in transactions exempt from registration. The Commission requests comments as to whether, in the case of fungible securities, it should require participation in the kind of closed trading system discussed above, or would the resale restrictions proposed adequately protect against an unregistered, non-exempt public offering in the United States?

The procedures proposed under the third tier have not been proposed with respect to fungible securities covered by tier 1. The distinction is based on the premise that the qualified institutions are sufficiently sophisticated and experienced in the trading of restricted securities to protect adequately against an illegal unregistered distribution from being effected. The Commission requests comment on the soundness of this premise, and on whether any of the resale restrictions proposed under the fungible securities tier should be applied to all or some portion of the qualified institutional buyer and non-fungible securities tiers. In particular, the Commission requests comment on the adequacy of relying on notice to the buyer that the seller may rely on Rule 144A to assure against leakage into the public market of fungible securities traded in the U.S. public markets, as would be permitted under the qualified institutional buyer tier. Similarly, is such notice sufficient in the case of non-fungible common stock of reporting companies, that would be covered by the non-fungible securities tier?

VI. Changes to Rule 144 and Rule 145

In connection with its consideration of proposed Rule 144A, the Commission has reexamined the principles underlying the determination of holding periods for purposes of Rule 144. As a result, the Commission is today proposing amendments to Rule 144's tacking concept.

While the proposed amendments to Rule 144 arose in the context of the development of Rule 144A, they would be applicable to all restricted securities, not only those sold under Rule 144A. The Commission's assessment of the advisability and effect of the Rule 144 changes must take into account their full scope. The Commission may determine to adopt one or more tiers of proposed Rule 144. Commentators therefore should address the merits of the proposals both independently and as a package.

Under the current Rule, restricted securities[192] generally are required to be held for at least two years before the holder may sell the securities in reliance upon the safe harbor provisions of Rule 144.[193] Except in limited instances,[194] the holding period of prior owners is not combined with, or "tacked" on to, the holding period of the person wishing to sell in reliance on Rule 144.[195]

The holding period condition incorporated in Rule 144 is intended to protect against an indirect public offering.[196] The prohibition against tacking of a prior holder's holding period derived in part from pre-Rule 144 theories pursuant to which a holder could be deemed to have acquired restricted securities with an investment intent rather than "with a view to distribution."[197] Finding that these

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[191] The American Stock Exchange, Inc. has proposed a domestic market for institutional trading of unregistered foreign securities to be known as SITUS, for "System for Institutional Trading of Unregistered Securities." The National Association of Securities Dealers, Inc. is developing a NASDAQ-type system for the trading of unregistered securities of major foreign and domestic issuers. The NASD system will be known as PORTAL, for "Private Offerings, Resales and Trading through Automated Linkages." The proponents of these systems have not yet established the availability of exemptions from the applicable provisions of the Securities Act or the Exchange Act, and this discussion should not be read to indicate that the Commission has made any determination as to the application of the provisions of such Acts to either SITUS or PORTAL.

[192] The term "restricted securities" presently is defined in Rule 144(a)(3), 17 CFR 230.144(a)(3), as securities that are acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering, or securities acquired from the issuer that are subject to the resale limitations or Regulation D or Rule 701(c) (§ 230.701(c) of this chapter) under the Act, or securities that are subject to the resale limitations of Regulation D and are acquired in a transaction or chain of transactions not involving any public offering.

The Commission proposes to amend this provision to reflect the inclusion of securities acquired in Rule 144A transactions.

[193] Rule 144(d)(1) (17 CFR 230.144(d)(1)).

[194] Rule 144(d)(4) sets forth specific provisions that permit a holder or transferee of restricted securities to "tack" (a) the holding period of the transferor, based on an identity of interest between such transferors and transferees as a pledgor and pledgee Rule 144(d)(4)(iv)), donor and donee (Rule 144(d)(4)(v)), settlor and trust (Rule 144(d)(4)(vi)), and a decedent and his estate (Rule 144(d)(4)(vii)); and (b) the period of time certain restricted securities have been held to the holding period of "related" securities subsequently acquired from the issuer as a dividend or pursuant to a stock split or recapitalization (Rule 144(d)(4)(i)), for consideration consisting solely of such other securities of the same issuer surrendered for conversion (Rule 144(d)(4)(ii)), or as a contingent payment of the purchase price of an equity interest in a business, or the assets of a business, sold to the issuer or an affiliate of the issuer. (Rule 144(d)(4)(iii)).

[195] *See* Securities Act Release No. 5223 (Jan. 11, 1972) (37 FR 591). *See also* J. Halperin, *Private Placement of Securities* § 8.19, at 279 (1984); D. Goldwasser, *A Guide to Rule 144* 439 (1978); Securities Act Release No. 6099 (Aug. 2, 1979) (44 FR 46752) (Questions 33 and 34).

[196] *See* Preliminary Note to Rule 144.

[197] *See* Section 2(11) of the Securities Act of 1933 (15 U.S.C. 77b(11)). *See also In Re The Crowell-Collier Publishing Co.*, Securities Act Release No. 3825 (Aug. 12, 1957) ("one evidentiary fact" to be considered in ascertaining whether a purchaser took with investment intent, rather than with the intent to distribute that would render him a statutory underwriter, is the length of the period between acquisition and resale).

Prior to the adoption of Rule 144, the Commission focused on two factors in ascertaining whether a holder of unregistered securities had purchased with the requisite investment intent: (1) The length of time the securities were held, as determined by the holder's execution of an "investment letter" on the date of purchase containing the assertion that he was not taking the securities with a view to their later distribution, but instead intended to hold them for investment (*see, e.g., Riker-Maxson Corp.* (avail. Dec. 27, 1971)); and (2) any "change in circumstances" between purchase and resale indicating that such resale was not contemplated at the time the security was acquired (*see, e.g., Computest Corp.* (avail. Oct. 8, 1971)). *See* Preliminary Note to Rule 144; *see also U.S. Securities and Exchange Commission, Disclosure to Investors—A Reappraisal of Federal Administrative Policies Under the '33 and '34 Acts: The Wheat Report* 162–71 (1969); 7B J. Hicks, *Exempted Transactions Under the Securities Act of 1933* § 9.02(2)(a) (1988 rev'd ed.).

theories had generated substantial uncertainty in the application of the securities Act's registration provisions, while failing to assure adequate protection of investors, the Commission adopted Rule 144 to provide a more objective and certain standard for determining when securities could be sold to the public without concern for the seller being found to be a statutory underwriter.[198] In 1981, paragraph (k) was added to the Rule to provide a defined holding period beyond which the previously restricted securities could be resold freely by non-affiliates.[199] And, in 1983, the public information requirement was dropped from Rule 144(k).[200]

As a result of its reexamination of the resale issue, the Commission today is proposing to amend Rule 144 to permit holders of securities acquired in a transaction or chain of transactions not involving any public offering to include the holding period of prior unaffiliated holders. The proposed changes to Rule 144 would apply to securities acquired in reliance upon proposed Rule 144A as well as to other restricted securities. Requiring securities to be held for two years by each successive holder before permitting Rule 144 resales, without regard to the time elapsed from the date of the sale of the security by the issuer or an affiliate, appears to be unnecessarily restrictive. A single period running from the date of the purchase from the issuer or its affiliate would appear sufficient to prevent the distribution of restricted securities to the public.

Rule 144(d)(1) thus is proposed to be amended to allow the two-year period prescribed therein to run continuously from the acquisition of restricted securities from the issuer, or from any affiliate thereof, until the subsequent resale of the securities by either the initial holder or a subsequent holder. Because of its "issuer" status for purposes of the rule,[201] an affiliate's resale of securities acquired at some point in a chain of transactions occurring within two years of a non-affiliate's acquisition of such securities from the issuer or an affiliate will trigger the commencement of a new period.

As proposed, Rule 144(k) similarly would be amended to permit a non-affiliate, who has been a non-affiliate for at least three months, to resell restricted securities free of the restrictions imposed by paragraphs (c), (e), (f), and (h) of Rule 144 if a period of at least three years, as computed in accordance with paragraph (d) of the rule, had elapsed since the later of the date the securities originally were acquired from the issuer or the date they were acquired from an affiliate of the issuer.

Comment is sought, first, regarding the impact on the secondary private markets for debt and equity securities, respectively, of the present general rule barring tacking by successive purchasers of such securities, and second, the anticipated consequences to such markets of the proposed amendments. Commentators should identify, to the extent possible, the particular effect of such change on sales to non-institutional investors. Commentators also should address the impact of the adoption of Rule 144A if the current bar on tacking is retained.

As under existing Rule 144, where the initial acquisition is a sale, the two-year period would not begin to run until the full purchase price had been paid by the person acquiring the securities from the issuer or an affiliate of the issuer.[202] Likewise perpetuating the requirements of the present Rule, amended subdivision (d)(2) of the rule would provide that payment for the securities acquired from the issuer or an affiliate by means of a promissory note, other obligation or installment contract would not be deemed full consideration unless specific conditions were met.[203]

Consistent with the focus of the revised approach to determination of the period required prior to the resale of restricted securities in reliance upon Rule 144's safe harbor, the Commission is proposing to rescind existing Rule 144(d)(3). Proposed subdivisions (d)(1) and (k) would provide for a single two or three year period running from the date of acquisition from the issuer or an affiliate of the issuer. Under such an approach, the question whether the initial or any subsequent holder sold short or otherwise held a contingent position in restricted securities is irrelevant, provided the person acquiring the securities from the issuer or an affiliate of the issuer paid full consideration for the securities and the prescribed period had run. The Commission seeks comment on any potential adverse or beneficial effects of the rescission of Rule 144(d)(3), if any, on institutional and non-institutional participants in the secondary private markets.

As discussed, the two and three year periods established by proposed Rule 144(d)(1) and proposed amended Rule 144(k) would begin anew for persons acquiring securities from an affiliate of the issuer. Exceptions to this general rule would be preserved expressly in proposed Rules 144(d)(3)(iv) through (vii)[204] for the benefit of persons taking securities from an affiliated pledgor, donor, trust settler or deceased person.[205] The existing Rule enables a holder of securities to combine with his own holding period, the holding period of either an affiliated or a non-affiliated transferor under those circumstances. By contrast with the "sale" transactions contemplated by existing and proposed Rule 144(d)(1), pursuant to which an affiliate seller's holding period may not be tacked to that of the buyer, there is an identity of interest between a transferee who acquires securities in what the Commission traditionally has considered to be a non-sale transaction. Regardless of whether the transferor in such a non-sale transaction is an affiliate or non-affiliate of the issuer, the transferee should be permitted to avail himself of the holding periods of his respective transferor.

The proposed revisions to Rules 144(d)(1) and (k) render such provisions unnecessary for transferees of a non-affiliate. Under paragraphs (d)(3) (iv) through (vii), the holding period of an affiliate's pledgee, donee, trust or estate similarly would continue to relate back to the date of acquisition by the affiliate. As under current paragraph (d)(3)(vii), the two and three year periods would not be required for estates and beneficiaries thereof that are not affiliates of the issuer. Paragraphs (c), (f), (g), (h) and (i) of the Rule would continue to apply to securities sold by such persons in reliance upon Rule 144's safe harbor in less than three years.

Comment is sought as to the continuing validity of the Commission's

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[198] Preliminary Note to Rule 144, citing Section 2(11) of the Securities Act (15 U.S.C. 77b(11)).

[199] Securities Act Release No. 6286 (Feb. 6, 1981) (46 FR 44771). *See* Securities Act Release No. 6488 (Sept. 23, 1983) (46 FR 12195).

[200] Securities Act Release No. 6487 (Sept. 23, 1983) (48 FR 44843).

[201] For purposes of Rule 144, an affiliate of an issuer "is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer." Rule 144(a)(1). *See* Rule 405 (17 CFR 230.405). Section 2(11) of the Securities Act defines the term "issuer" to include an affiliate of the issuer. Accordingly, any person purchasing from an affiliate may be deemed a statutory underwriter.

[202] Proposed paragraph (d)(1) of Rule 144.

[203] Proposed paragraph (d)(2) of Rule 144.

[204] Present Rules 144(d)(4)(iv) through (d)(4)(vii) (17 CFR 230.144(d)(4)(iv) through (d)(4)(vii)). Rule 144(d)(4) would be renumbered as 144(d)(3) if the Commission rescinds existing Rules 144(a)(3) as proposed.

[205] *See supra* n. 194

position regarding tacking of holding of securities acquired from an affiliated pledgor, donor, settlor or deceased individual. Commentators should address the merits of the Commission's view of proposed (d)(3)(iv) through (d)(3)(vii) [206] transactions, and of the possibility that the different treatment of affiliates engaged in such transactions would give rise to a distribution of restricted securities.

Currently, the acquisition or securities pursuant to a transaction of the type specified in Rule 145(a) is considered a purchase from the issuer for purposes of Rule 144.[207] Proposed subdivision (d)(3)(viii) makes it clear, consistent with this view, that the two and three year periods established by Rules 144 (d) and (k) and incorporated in Rule 145(d) would commence running on the date the holder is deemed to have acquired the securities in a Rule 145(a) transaction. Proposed Rule 145(d) would provide for the resale by such person or party of the securities thus acquired after a period of two or three years as computed under amended Rules 144(d) or (k). Finally, an exception set forth in new Rule 144(d)(3)(viii) would codify the staff's interpretation position that a transaction effected solely for the purposes of forming a holding company will be deemed a "recapitalization" within the meaning of existing Rule 144(d)(4)(i); [208] therefore, the holding period of the holding company's securities is tacked to that of the predecessor operating company's securities.[209] In determining whether a transaction is solely for the purposes of forming a holding company, the analysis outlined in the *Morgan, Olmstead, Kennedy & Gardner Capital Corp.* letter would be followed.

Comment is sought on the continuing applicability of the non-tacking principal proposed to be codified in Rule 144(d)(3)(viii), as well as codification of the exception to the principle that is proposed in this new subdivision.

The proposed amendments to Rule 144 are intended only to establish the commencement date for determining the two and three year periods, and do not change the required aggregation of the seller's and buyer's sales in determining compliance with the volume limitations prescribed by Rule 144(e)(2).[210] If the transaction, while denoted as a purchase acquisition, were found in substance to be a transaction specified in paragraphs (d)(3) (iv) through (vii) of the Rule, as proposed to be amended, the substance of the transaction would govern and the applicable aggregation principles set forth in Rule 144(e) therefore would apply. Where two or more affiliates or other persons agree to act in concert for the purpose of selling restricted securities, aggregation also may be required under Rule 144(e)(3)(vi).

VII. Cost-Benefit Analysis

To evaluate fully the benefits and costs associated with proposed Rule 144A, the Commission requests commenters to provide views and data as to the costs associated with private resales under current law as compared to such estimated costs under the proposed Rule. In this regard, the Commission notes that the proposed Rule should facilitate resales by providing a rule to accommodate existing practice. The Commission also requests commenters to provide views and data regarding the costs and benefits of the proposed Rule to issuers of securities, institutional and other investors and the trade markets.

By providing clearer guidance as to the applicability of the Securities Act registration provisions, the proposed Rule should increase the marketability of unregistered securities sold and thus result in reduced capital-raising costs to issuers, since a deeper secondary market should enable them to obtain more favorable prices for their securities. In addition, purchasers and sellers should benefit from the increased liquidity provided by this secondary market.

As the proposed Rule sanctions certain existing practices, is non-exclusive, and does not impose any record keeping or reporting requirements, the Commission is not aware of any additional costs that would result from the proposal.

The Commission also requests commenters to provide views and data on the costs associated with resales under Rule 144 and Rule 145 as presently in force and as proposed to be amended. As the proposed amendments would not require any different procedures for resale, and would allow resales to be made under Rule 144 sooner than is presently the case in many instances, the Commission does not anticipate any additional costs to result from the proposed amendment.

VIII. Initial Regulatory Flexibility Act Analysis

This initial regulatory flexibility analysis relates to proposed new Rule 144A and amendments to Rules 144 and 145 under the Securities Act of 1933 ("Securities Act"), and has been prepared in accordance with the Regulatory Flexibility Act.[211]

A. Reasons for Proposed Action

The Commission is proposing Rule 144A because it appears that, in certain circumstances, specified institutional investors may not need the protection of the registration provisions of the Securities Act. Further, registration in such circumstances may impose undue burdens on the parties to these transactions. If this Rule is adopted, a more efficient market for resales to institutional investors should develop.

The Commission is proposing to amend Rules 144 and 145 to provide a more equitable means of determining the period for which restricted securities must be held before public resale is protected by the rules. The effect of these changes would be that restricted securities could be sold subject to certain conditions after two years from the date of their acquisition from an issuer or an affiliate thereof, and would be freely resalable three years after such acquistion.

B. Objectives

The proposed Rule 144A is intended to provide a nonexclusive safe harbor from the registration requirements of the Securities Act for resales of securities to institutional investors. The proposed Rule includes three tiers. The first (the "qualified institutional buyer tier") would allow resales of any securities to institutions with assets of $100 million or more. The second (the "non-fungible

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[206] Present Rules 144(d)(4)(iv) through (d)(4)(vii) (17 CFR 230.144(d)(4)(iv) through (d)(4)(vii)).

[207] 17 CFR 230.145(a). As explained in the Preliminary Note to Rule 145, persons who are offered securities in business combinations of the following types may avail themselves of the safe harbor available under the Rule: (1) Reclassification, other than a stock split, reverse stock split or change in par value, that involves the substitution of one security for another; (2) merger or consolidation; and (3) transfer of assets in consideration of the issuance of securities under certain conditions.

[208] Proposed Rule 144(d)(3)(i).

[209] *See Morgan, Olmstead, Kennedy & Gardner Capital Corp.*, [1987–1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78.672 (avail. Dec. 8, 1987) (permitting such tacking subject to four conditions: (1) The holding company stock must be issued solely in exchange for the operating stock; (2) security holders receive securities of the same class and in the same proportions as exchanged; (3) the holding company is newly formed has not significant assets except operating company securities immediately after the transaction and, at that time, has substantially the same assets and liabilities, on a consolidated basis, as those of the operating company immediately prior to the transaction; (4) the rights and interests of common stockholders in the holding company are substantially the same as they had as holders of the operating company's common stock).

[210] 17 CFR 230.144(e)(2).

[211] 5 U.S.C. 603.

securities tier") would permit unlimited resales of restricted securities of a class not publicly traded in the United States to specified institutions of a smaller size, provided the securities to be offered or sold were non-convertible debt securities or non-convertible preferred stock, or securities of an issuer reporting under the Securities Exchange Act of 1934. The third tier (the "fungible securities tier") would allow unlimited resales of restricted securities of a class publicly traded in this country, if the securities were non-convertible debt securities, non-convertible preferred stock, or securities of a reporting company. In addition, the fungible securities tier would require that the seller take reasonable steps to guard against an unlawful distribution in the United States by the purchaser.

The proposed changes to Rule 144 (and thus, Rule 145) would have the effect of enabling holders of restricted securities to "tack" the holding period of sellers other than the issuer or affiliates of the issuer of the securities. Currently, Rule 144 permits the public resale of restricted securities when certain conditions, including a minimum holding period of two years (Rule 144(d)(1)) or three years (Rule 144(k)), are met. Tacking generally is not permitted in calculating Rule 144 holding periods. Rule 145 in turn permits public resales of securities issued in certain business combinations, provided in part that mimimum holding periods prescribed by Rule 144 have run.

Under the proposed amendments to Rule 144, the two or three year period for restricted securities, including securities acquired meeting the requirements of Rule 144A, would commence at the time the securities were acquired or deemed to have been acquired from the issuer or an affiliate of the issuer. Thus, the periods imposed by Rule 144 would run continuously from the initial acquisition of restricted securities to the resale of such securities two or three years later by either the holder or a subsequent holder. Only an affiliate's acquisition and resale of the securities, at some point in a chain of transactions occurring during the running of the period, would trigger the commencement of a new holding period for any person taking from such affiliate. Because Rule 145 holding periods are determined by reference to Rule 144, Rule 145 would be amended to reflect the proposed amendments to Rule 144.

C. Legal Basis

Rule 144A and the amendments to Rules 144 and 145 are being proposed by the Commission pursuant to sections 2(11), 4(1), 4(3) and 19(a) of the Securities Act.[212]

D. Small Entities Subject to the Rule

The Commission has adopted definitions of the term "small entity" for the various entities subject to Commission rulemaking. When used with reference to an "Issuer," other than an investment company, the term is defined by Rule 157 [213] under the Securities Act as an issuer whose total assets on the last day of its most recent fiscal year were $5,000,000 or less and that is engaged or proposing to engage in an offering of securities which does not exceed $5,000,000. The Commission has no data on the number of such small entities that would be affected by proposed Rule 144A, and an estimation of such number is not currently feasible. However, during 1987, about 750 small issuers engaged in public offerings of $5,000,000 or less. If the non-fungible securities or fungible securities tier of proposed Rule 144A were ultimately adopted, the Rule 144A might affect small issuers disproportionately. The Rule would not be available for the resale of common equity securities issued by most small issuers. Therefore, the effect of the Rule could be to ease certain burdens for larger rather than small entities with respect to resales covered by the Rule. To the extent that small issuers are directly affected by the proposed Rule, however, the Rule's enhancement of the liquidity of the private secondary markets should make it easier for such issuers to sell securities in that market. If the qualified institutional buyer tier ultimately were adopted, small issuers would not be disproportionately affected by Rule 144A, as that tier is not limited to debt securities, preferred stock and securities issued by reporting issuers.

As regards broker-dealers subject to the proposed Rule, Rule 0–10(c) under the Exchange Act [214] indicates that a "small entity" or "small organization" for the purposes of the Regulatory Flexibility Act shall mean a broker or dealer that (1) had total capital of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) [215] or if it is not required to file such statements, a broker or dealer that had total capital of less than $500,000 on the last business day of the preceding fiscal year, and (2) is not affiliated with any person that is not a small business or small organization as defined in this section. The Commission has no data on the number of such small entities or organizations that would be affected by proposed Rule 144A, and an estimation of such number is not currently feasible. However, as of the end of 1987, approximately 7,233 broker-dealers were small entities or organizations as defined by this rule. Small entities that are broker-dealers generally would be affected by the proposed Rule 144A in the same way as other investment firms.

The proposed Rule 144A may affect small businesses that are institutional investors. To the extent that these investors are affected by the proposed Rule, the Rule should make it easier for them to resell privately placed securities principally due to the improved liquidity of this market. However, the qualified institutional buyer tier of the proposal would provide a wider safe harbor to institutional investors having total assets in excess of $100 million.

The proposed amendments to Rules 144 and 145 are expected to reduce the costs associated with sales of restricted securities by small and large issuers alike. As stated above, the Commission has no data on the number of such small entities or organizations that would be affected by the proposed amendments, and an estimation of such number is not currently feasible.

E. Reporting, Recordkeeping and other Compliance Requirements

Rule 144A, if adopted, would provide a safe harbor from the registration provisions of the Securities Act, and thus may result in the filing of fewer registration statements under that Act. If so, adoption of the Rule may result in decreased reporting, recordkeeping, and other complaince requirements with respect to transactions covered by the Rule.

The amendments to Rules 144 and 145 would have no significant effect on reporting, recordkeeping, and other compliance requirements.

F. Overlapping or Conflicting Federal Rules

It does not appear that the proposed Rule 144A and the proposed amendments to Rules 144 and 145 duplicate, overlap, or conflict with any existing Federal Rule.

G. Significant Alternatives

Proposed new Rule 144A and the amendments to Rules 144 and 145 are intended to benefit all issuers, regardless of size, by providing clarification of the circumstances in which resales of securities made to

[212] 15 U.S.C. 77b(11), 77d(1), 77d(3), and 77s(a).
[213] 17 CFR 230.157.
[214] 17 CFR 240.0–10(c).
[215] 17 CFR 240.17a–5(d).

institutional investors may be made without registration under the Securities Act.

A possible alternative to the proposed Rule 144A and the amendments to Rules 144 and 145 might include the establishment of differing compliance or reporting requirements for small entities. Such an alternative, however, based only on the size of the issuer and no other criteria, would not be consistent with the goal of the Securities Act to protect investors. Further clarification, consolidation, or simplification of compliance and reporting requirements under the regulation for small entities also would not be appropriate. The proposed Rule and the amendments are themselves a clarification and simplification of compliance and reporting requirements, and additional simplification for small entities would not be consistent with the Commission's statutory mandate.

Another alternative could be the adoption of performance rather than design standards with regard to resales and holding periods for such resales. Use of performance rather than design standards in a safe-harbor context would frustrate the ability of persons relying on Rule 144A and the amendments to Rules 144 and 145 to ascertain whether all the conditions for meeting the safe harbor were satisfied. An exemption from the provisions of the regulation for small entities would exclude such entities from coverage of the safe harbor. Application of the Rule and the amendments to both large and small entities is consistent with the Commission's mandate.

An alternative to the amendments to Rules 144 and 145 could be the elimination of all holding periods for resales of restricted securities. However, it appears that a period of two years (Rule 144(d)(1)) or three years (Rule 144(k)) is necessary to prevent the distribution of restricted securities from affecting the market for publicly-held securities of the issuer.

H. Solicitation of Comments

The Commission encourages the submission of written comments with respect to any aspect of this initial regulatory flexibility analysis. Such written comments will be considered in the preparation of the final regulatory analysis if the proposed Rule is adopted. Persons wishing to submit written comments should file four copies of such comments with Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washingtron, DC 20549. All submissions should refer to File No. S7-23-88 and will be available for public inspection and copying at the Commission's Public Reference Room.

IX. Requests for Comments

Any interested persons wishing to submit written comments on proposed Rule 144A and the proposed amendments to Rules 144 and 145, as well as on other matters that may have an impact on the proposals, are requested to do so. The Commission specifically requests that commenters address whether the qualified institutional buyer tier, the non-fungible securities tier or the fungible securities tier of proposed Rule 144A, or a combination of two or three of the tiers, would be preferable.

In addition to the specific requests for comments appearing elsewhere in this release, the Commission generally seeks comment on the potential market impact of proposed Rule 144A and on the usefulness of the proposed Rule for resales of securities by institutional investors.

X. Statutory Basis for Proposals

Rule 144A is being proposed by the Commission and Rules 144 and 145 are proposed to be amended by the Commission pursuant to sections 2(11), 4(1), 4(3), and 19(a) of the Securities Act of 1933.

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

XI. Text of Proposals

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 is amended by adding the following citation: (citations before * * * indicate general rule making authority).

Authority: Sec. 19, 48 Stat. 85, as amended, 15 U.S.C. Section 77S * * * Section 230.144A also issued under sec. 2, 48 Stat. 74, as amended, 15 U.S.C. 77b; and also sec. 10, 48 Stat. 81 as amended, 15 U.S.C. 77j.

2. By adding § 230.144A to read:

§ 230.144A Private resales of securities to institutions.

Preliminary Notes

1. Attempted compliance with this rule does not act as an exclusive election; any seller hereunder may also claim the availability of any other applicable exemption from the registration requirements of the Act.

2. Nothing in this rule obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act of 1934 (the "Exchange Act"), whenever such requirements are applicable.

3. Nothing in this rule obviates the need for any person to comply with any applicable state law relating to the offer and sale of securities.

4. Securities acquired in a transaction meeting the conditions of this rule are considered to be "restricted securities" within the meaning of § 230.144(a)(3) of this chapter.

(a) *Definitions.* The following definitions shall apply for purposes of this § 230.144A.

(1) "Institutional buyer" means any of the following:

(i) Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act, whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Exchange Act; any insurance company as defined in section 2(13) of the Act; any investment company registered under the Investment Company Act of 1940 (the "Investment Company Act") or business development company as defined in section 2(a)(48) of that Act; any small business investment company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974, if the investment decision is made by a plan fiduciary, as defined in section 3(21) of that Act, which is either a bank, savings and loan association, insurance company, or investment adviser registered under the Investment Advisers Act of 1940 (the "Investment Advisers Act"), or if the employee benefit plan has total assets of $5,000,000;

(ii) Any private business development company a defined in section 202(a)(22) of the Investment Advisers Act;

(iii) Any corporation, Massachusetts or similar business trust, organization described in section 501(c)(3) of the Internal Revenue Code, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5,000,000; or

(iv) Any entity all of the equity owners of which are institutional buyers.

(2) "Qualified institutional buyer" means any of the following:

(i) Any institutional buyer that has total assets in excess of $100,000,000;

(ii) Any investment adviser registered under the Investment Advisers Act that has total assets in excess of $100,000,000;

(iii) Any investment company registered under the Investment Company Act that is part of a family of investment companies with aggregate total assets in excess of $100,000,000. "Family of investment companies" means:

(A) Except for insurance company separate accounts, any two or more investment companies separately registered under the Investment Company Act that share the same investment adviser or principal underwriter and that hold themselves out as related companies for purposes of investment and investor services; or

(B) With respect to insurance company separate accounts, any two or more separate accounts separately registered under the Investment Company Act that share the same investment adviser or principal underwriter and that function under operational or accounting or control systems that are substantially similar; or

(iv) Any entity all of the equity owners of which are qualified institutional buyers.

(3) "Total assets" of a person means the sum of:

(i) The total assets of that person or of that person and any consolidated subsidiaries thereof, whichever is larger, as determined in accordance with the provisions of Regulation S-X under the Act; and

(ii) For purposes of paragraph (d)(1) of this § 230.144A, with respect to an investment adviser registered under the Investment Advisers Act, any assets as to which that person, as an investment manager, exercises investment discretion.

(b) Any person, other than the issuer or a dealer, who offers or sells securities in compliance with the conditions set forth in paragraph (d)(1), (2) or (3) of this § 230.144A shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter thereof within the meaning of sections 2(11) and 4(1) of the Act.

(c) Any dealer who offers or sells securities in compliance with the conditions set forth in paragraph (d)(1), (2) or (3) of this § 230.144A shall be deemed not to be a participant in the distribution of such securities within the meaning of section 4(3)(C) of the Act, and such securities shall be deemed not to have been offered to the public within the meaning of section 4(3)(A) of the Act.

(d) *Conditions to be Met.* To qualify for exemption under this § 230.144A, an offer or sale must satisfy the conditions of paragraph (d)(1), (2) or (3) of this section:

(1) *Securities offered and sold to qualified institutional buyers.* (i) The securities are offered and sold only to a qualified institutional buyer or nominee thereof, or the seller and any person acting on its behalf reasonably believe that the offeree or purchaser is a qualified institutional buyer or nominee thereof. In determining whether a particular person is a qualified institutional buyer, the seller and any person acting on its behalf shall be entitled to rely on financial statements or other material filed with the Commission pursuant to the Act, the Exchange Act, the Investment Company Act, or the Investment Advisers Act, unless the seller or any person acting on its behalf knows or has reason to believe that such person is not a qualified institutional buyer; and

(ii) The seller or any person acting on its behalf takes reasonable steps to ensure that the purchaser is aware that the seller may rely on an exemption from the provisions of section 5 of the Act pursuant to this § 230.144A.

(2) *Non-convertible debt securities, non-convertible preferred stock and securities of reporting companies offered and sold to institutional buyers and of a class not traded in any U.S. public market.* (i) The securities are offered and sold only to an institutional buyer or nominee thereof, or the seller and any person acting on its behalf reasonably believe that the offeree or purchaser is an institutional buyer or nominee thereof;

(ii) Securities of the same class as the securities offered or sold are not quoted in an inter-dealer quotation system within the meaning of § 240.15c2–7(c) under the Exchange Act or listed on a national securities exchange registered under section 6 of the Exchange Act, nor are securities of an open-end investment company, unit investment trust or face-amount certificate company that is registered under section 8 of the Investment Company Act;

(iii) Either:

(A) For a period of at least 90 days immediately preceding the offer or sale of securities pursuant to this § 230.144A, the issuer shall have been subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and shall have filed all reports required to be filed thereunder during the 12 months preceding such offer or sale (or for such shorter period that the issuer was required to file such reports). The seller shall be entitled to reply upon (*1*) a written statement from the issuer, or (*2*) statements in quarterly or annual reports filed with the Commission by the issuer, that such issuer has met such reporting requirements unless the seller knows or has reason to believe that the issuer has not compiled with such requirements; or

(B) The securities offered or sold are non-convertible debt securities or non-convertible preferred stock; and

(iv) The seller or any person acting on its behalf takes reasonable steps to ensure that the purchaser is aware that the seller may rely on an exemption from the provisions of section 5 of the Act pursuant to this § 230.144A.

(3) *Non-convertible debt securities, non-convertible preferred stock and securities of reporting companies sold to institutional buyers, whether or not of a class traded in a U.S. public market.*

(i) The securities are offered and sold only to an institutional buyer or nominee thereof, or the seller and any person acting on its behalf reasonably believe that the offeree or purchaser is an institutional buyer or nominee thereof;

(ii) Either:

(A) For a period of at least 90 days immediately preceding the offer and sale of securities pursuant to this § 230.144A, the issuer shall have been subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and shall have filed all reports required to be filed thereunder during the 12 months preceding such offer or sale (or for such shorter period that the issuer was required to file such reports). The seller shall be entitled to rely upon (*1*) a written statement from the issuer, or (*2*) statements in quarterly or annual reports filed with the Commission by the issuer, that such issuer has met such reporting requirements unless the seller knows or has reason to believe that the issuer has not compiled with such requirement; or

(B) The securities offered or sold are non-convertible debt securities or non-convertible preferred stock; and

(iii) The seller or any person acting on its behalf takes reasonable steps to prevent the purchaser of the securities from reselling the securities in the United States unless they are registered under the Act or in exemption from registration is available. Such reasonable steps will be conclusively established where:

(A) The purchaser agrees in writing that the securities will not be resold in the United States unless they are registered under the Act or an exemption from registration is available; and

(B) The securities are in registered form, and are appropriately legended or subject to stop transfer instructions (in the case of non-exempt transactions not registered under the Securities Act).

(e) Offers and sales of securities pursuant to this § 230.144A shall be deemed not to affect the availability of any exemption relating to the previous or subsequent offer or sale of such securities by the issuer or any prior or subsequent holder thereof.

3. By revising § 230.144 paragraphs (a)(3) and (c)(2) to read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

(a) * * *

(3) The term "restricted securities" means securities that are acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering, or securities acquired from the issuer that are subject to the resale limitations of Regulation D (§ 230.501 through § 230.506 of this chapter) or Rule 701(c) (§ 230.701(c) of this chapter) under the Act, or securities that are subject to the resale limitations of Regulation D and acquired in a transaction or chain of transactions not involving any public offering, or securities that are acquired in a transaction meeting the requirements of Rule 144A (§ 230.144A of this chapter).

* * * * *

(c) * * *

(2) *Other Public Information.* If the issuer is not subject to section 13 or 15(d) of the Securities Exchange Act of 1934, there is publicly available the information concerning the issuer specified in paragraphs (i) to (xiv), inclusive, and paragraph (xvi) of paragraph (a)(5) of Rule 15c2-11 (§ 240.15c2-11 of this chapter) under that Act or, if the issuer is an insurance company, the information specified in section 12(g)(2)(G)(i) of that Act.

* * * * *

4. By further amending § 230.144 by revising paragraphs (d)(1) and (d)(2), removing paragraph (d)(3), redesignating (d)(4) as (d)(3), by revising newly redesignated (d)(3)(iv) through (d)(3)(vii), removing paragraph (a) of the note after (vii), removing the designation of paragraph (b) of the note after (vii), and adding a new (d)(3)(vii) as follows:

* * * * *

(d) * * *

(1) A minimum of two years must elapse between the later of the date of the acquisition of the securities from the issuer or from an affiliate of the issuer, and any resale of such securities pursuant to this rule by the acquiror or any subsequent holder of those securities. If the acquisition is a sale, the two-year period shall not begin to run until the full purchase price is paid by the person acquiring the securities from the issuer or from an affiliate of the issuer.

(2) Promissory Notes, Other Obligations or Installment Contracts. If the person making the acquisition of the securities from the issuer or from an affiliate of the issuer gives such seller a promissory note or other obligation to pay the purchase price or enters into an installment purchase contract with such seller, such consideration shall not be deemed full payment of the purchase price unless the promissory note, obligation or contract—

(3) * * *

(iv) *Securities pledged by an affiliate.* Securities which are bona fide pledged by an affiliate of the issuer when sold by the pledge, or by a purchaser, after a default in the obligation secured by the pledge, shall be deemed to have been acquired when they were acquired by the pledgor, except that if the securities were pledged without recourse they shall be deemed to have been acquired by the pledge at the time of the pledge or by the purchaser at the time of purchase.

(v) *Gifts of Securities by an affiliate.* Securities acquired from an affiliate of the issuer by gift shall be deemed to have been acquired by the donee when they were acquired by the donor.

(vi) *Trusts established by an affiliate.* Where a trust settlor is an affiliate of the issuer, securities acquired from the settlor by the trust, or acquired from the trust by the beneficiaries thereof, shall be deemed to have been acquired when such securities were acquired from the settlor.

(vii) *Estates.* Where a deceased person was an affiliate of the issuer, securities held by the estate of such person or acquired from such estate by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

Note.—While there is no holding period or amount limitation for estates and beneficiaries thereof which are not affiliates of the issuer, paragraphs (c), (f), (g), (h) and (i) of the rule apply to securities sold by such persons in reliance upon the rule.

(viii) *Rule 145(a) transactions.* The holding period for securities acquired in a transaction specified in Rule 145(a) shall be deemed to commence on the date the securities were issued in such transaction. This provision shall not apply, however, to a transaction effected solely for the purpose of forming a holding company.

* * * * *

5. By further amending § 230.144 by revising paragraph (k) as follows:

* * * * *

(k) Termination of certain restrictions on sales of restricted securities by persons other than affiliates. The requirements of paragraphs (c), (e), (f) and (h) of this rule shall not apply to restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of at least three years has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer. In computing the three-year period for purposes of this provision, reference should be made to paragraph (d) of this section.

6. By reviewing § 230.145(d to read as follows:

§ 230.145 Reclassification of securities, mergers, consolidations and acquisition of assets.

* * * * *

(d) *Resale provisions for persons and parties deemed underwriters.* Notwithstanding the provisions of paragraph (c), a person or party specified therein shall not be deemed to be engaged in a distribution and therefore not to be an underwriter of registered securities acquired in a transaction specified in paragraph (a) of this section if:

(1) Such securities are sold by such person or party in accordance with the provisions of paragraphs (c), (e), (f) and (g) of § 230.144;

(2) Such person or party is not an affiliate of the issuer and a period of at least two years, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were issued in such transaction, and the issuer meets the requiremens of paragraph (c) of § 230.144; or

(3) Such person or party is not, and has not been for at least three months, an affiliate of the issuer and a period of at least three years, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were issued in such transaction.

* * * * *

By the Commission,
Jonathan G. Katz,
Secretary.
October 25, 1988.

Concurring Statement of Commissioner Fleischman

The Committee paper cited in footnote 69 to the Commission's Release is now nearing the tenth anniversary of its publication. In that paper a "distinctive and definable" secondary market for resales of institutionally-held, privately-placed debt securities is described at some length [1] and, as part of the analysis of the availability of the section 4(1) and section 4(3) exemptions for such resales, the operation of that market in essentially the manner described is predicated in order to assess whether the "'factors' relevant to a determination of the *absence* of a 'distribution'" are met with respect to resales effected in that market.[2]

While my own experience sustains the thesis that the market to which the Committee paper refers continues to function as described, personal experience is not acceptable as a basis for Commission rulemaking, and in any event my direct knowledge ended nearly three years ago. Therefore, with respect to paragraph (d)(1) of proposed Rule 144A, I shall appreciate additional comments on the extent to which the Committee paper is accurate in 1988–89 in its description of the secondary market for institutionally-held, privately-placed securities of all types, with particular reference to whether the commenters believe that the conclusion that factors relevant to determining the absence of a distribution are met [3] is sustained by the manner in which that market presently operates.

Otherwise, I heartily concur in the Commission's action in proposing Rule 144A.

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD13 88-19]

Drawbridge Operation Regulations; Isthmus Slough, OR

AGENCY: Coast Guard, DOT.

ACTION: Proposed rule.

SUMMARY: At the request of the Oregon Department of Transportation (ODOT), the Coast Guard is considering a change to the regulations for the bascule bridge across Isthmus Slough, mile 1.0, at Coos Bay, Oregon. This change would require that 24 hours advance notice be given for bridge openings. The current regulation requires 4 hours notice. ODOT desires to change the locking mechanism of the bridge from electrical to manual. This mode of operation will require sending a crew to the bridge to open the draw. The proposed regulation would enable the bridge to be operated in a more economical, but slower fashion. It has not opened for the passage of a vessel since 1983.

DATE: Comments must be received on or before December 16, 1988.

ADDRESSES: Comments should be mailed to Commander (ob), Thirteenth Coast Guard District, 915 Second Avenue, Seattle, Washington 98174-1067. The comments and other materials referenced in this notice will be available for inspection and copying at 915 Second Avenue, Room 3410. Normal office hours are between 7:45 a.m. and 4:15 p.m., Monday through Friday, except holidays. Comments may also be hand-delivered to this address.

FOR FURTHER INFORMATION CONTACT: John E. Mikesell, Chief, Bridge Section, Aids to Navigation and Waterways Management Branch, (Telephone: (206) 442-5864).

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this proposed rulemaking by submitting written views, comments, data, or arguments. Persons submitting comments should include their names and addresses, indentify the bridge, and give reasons for concurrence with, or any recommended changes in, the proposal. Persons desiring acknowledgement that their comments have been received should include a stamped, self-addressed postcard or envelope. The Commander, Thirteenth Coast Guard District, will evaluate all communications and determine a course of final action on this proposal. The proposed regulations may be changed in light of comments received.

Drafting Information

The drafters of this notice are: Austin Pratt, project officer, and Lieutenant Commander Lawrence I. Kiern, project attorney.

Discussion of the Proposed Regulations

The Oregon Department of Transportation has asked the Coast Guard to approve a change to the operating regulations which would require that vessels request openings at least 24 hours in advance of the time they wish to pass the isthmus Slough Bridge. This change would allow the bridge owner to convert the locking mechanism to a manual model that would require less maintenance. A crew would then be dispatched to operate the bridge. Since 1973 the regulations have required 4 hours advance notice for opening of the drawspan. Records show a decline in openings since 1973 and the bridge has not opened for a vessel since 1983. Before this time a lumber company located upstream of the bridge shipped out finished products on vessels large enough to require the bridge to open. This is no longer the case. The waterway continues to be used commercially for log towing, but all vessels presently navigating Isthmus Slough are able to pass under the bridge while it is closed. The proposed regulation would permit the bridge owner to reduce maintenance costs and still serve the reasonable needs of navigation on Isthmus Slough.

Economic Assessment and Certification

These proposed regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and non-significant under the Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). The economic impact of this proposal is expected to be so minimal that full regulatory evaluation is unnecessary. Navigation and marine related interests will not be significantly affected by this proposed rule because the subject bridge is opened infrequently for vessels. The reasonable needs of these interests would still be met by the proposed operating regulation. Since the economic impact of this proposal is expected to be minimal, the Coast Guard certifies that, if adopted, it will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 33 CFR Part 117

Bridges.

Proposed Regulations

In consideration of the foregoing, the Coast Guard proposes to amend Part 117 of Title 33, Code of Federal Regulations as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for Part 117 continues to read as follows:

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[1] Committee paper at 1931–37.

[2] *Id.* at 1948 (emphasis in original).

[3] *See* text of the Release accompanying notes 144 and 148.